January 2011

Silencing the Public's Voice: The Adverse Effects of Mountain Communities for Responsible Energy v. Public Service Commission of West Virginia

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SILENCING THE PUBLIC’S VOICE: THE ADVERSE EFFECTS OF MOUNTAIN COMMUNITIES FOR RESPONSIBLE ENERGY V. PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

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I. INTRODUCTION

Wind power can be a controversial topic. Environmentalists might support a wind power project because it is a source of alternative energy. Landowners might be concerned about the presence of a nearby wind power project affecting the value of their property or the quality of life at their homes. Members of the local community might have concerns about the wind power project’s impact on the community as a whole, including areas of cultural or historical significance to the local community. The Beech Ridge Energy, LLC (“Beech Ridge”) wind power project in Greenbrier County, West Virginia, embodies many of these controversial concerns.

On August 28, 2006, the West Virginia Public Service Commission (“Commission”) issued an order conditionally approving the construction of the Beech Ridge wind power project in Greenbrier County, West Virginia. The West Virginia Supreme Court of Appeals (“West Virginia Supreme Court”) upheld that order in June 2008. Unfortunately, these orders silenced the public voice in this case by removing any opportunity to meaningfully participate in the discussion of the impact of the wind power project on the local community. Furthermore, these decisions will lead to adverse impacts on the public's ability to have its voice heard in similar matters before the Commission in the future. Moreover, as discussed in more detail in Section II.B of this Note, these orders were in error because the Commission has abrogated its statutory mandates to review a complete project application and to protect the public interest. In the governing statutory language, there is no discretionary power granted to the Commission regarding the minimum contents of an application for construction of a wind project. The language plainly states that an application shall include certain items that must be reviewed by the Commission. If the Commission

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3 See infra Part III for more details on this argument.
4 Id.
5 Id.
fails to review a complete application, then it fails to fulfill the duties the West Virginia Legislature envisioned for the Commission. If the Commission is no longer required to meet its statutory requirements on this issue, then the Commission may no longer have to meet other statutory requirements.

In addition, by failing to review all the information that the West Virginia Legislature determined is necessary to make an informed decision that protects the public interest, the Commission has severely limited the public’s ability to have its voice heard regarding possible impacts to areas of cultural and historical significance potentially impacted by proposed energy projects. Moreover, this injury to the public interest was not corrected when the Commission stated in its conditional order that it would defer to the State Historic Preservation Office (“SHPO”) on cultural and historical information contained in the project application. Even though the SHPO presumably has more expertise than the Commission on matters of cultural and historical relevance, it does not have the same statutory mandate to protect the public interest. Interested persons were not able to provide public comment regarding various cultural and historical data: (1) the SHPO’s review of the affected areas, (2) the SHPO’s identification of adverse effects to those areas, and (3) Beech Ridge’s and the SHPO’s proposed mitigation efforts to the identified adverse impacts. Because interested persons from the community were not given an opportunity for participation in the SHPO review process, the Commission’s reliance on the SHPO was not sufficient protection of public interests—a duty that the Commission must perform.6 Because the SHPO is not under the same obligation to preserve the public interest, this failure does not reflect upon the SHPO’s work. The failure belongs to the Commission, as well as the West Virginia Supreme Court when it affirmed the Commission’s decision.

This Note will explore the impact that the Commission’s decision and the West Virginia Supreme Court’s order make on the public’s ability to address areas of cultural and historical significance in connection with future wind power projects. Part II of this Note will introduce the background law relevant to the project, as well as the Beech Ridge wind project itself. Then, Part III of this Note will examine the errors with the orders. Finally, Part IV will discuss the adverse impacts that the orders will have on future proceedings.

II. BACKGROUND

It is first necessary to explore the legal and factual background of the wind project before discussing the issues in connection with the Orders.

A. Overview of Wind Power in West Virginia

Wind power has become a prominent source of renewable energy in recent years. Because wind generation facilities are usually controlled by state agencies, there are various ways in which such facilities might be regulated. In West Virginia, the Commission serves as the regulating agency. After an applicant identifies a potential site location for a wind facility and completes any logistical pre-application work, the applicant must file a siting certificate application with the Commission for approval of the project before construction on the project can begin.

The Commission was established by the West Virginia Legislature in 1913. The West Virginia Legislature charged the Commission “with the responsibility for appraising and balancing the interests of current and future utility service customers, the general interests of the state’s economy[,] and the interests of the utilities subject to its jurisdiction in its deliberations and decisions.” The West Virginia Legislature expressly granted jurisdiction to the Commission over “public utilities in [the] state[,] includ[ing] any utility engaged in . . . generation and transmission of electrical energy . . . for service to the public, whether directly or through a distributing utility.”

On its website, the Commission states that its mission is to “support and promote a utility regulatory . . . environment that balances the interests of all parties and pursues excellence through quality.” In addition, the Commission’s Vision Statement identifies goals that reflect an intent to balance the in-

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9 The word “site” is defined in Black’s Law Dictionary as a “place or location[,] especially[] a piece of property set aside for a specific use.” BLACK’S LAW DICTIONARY 1154 (Abridged 8th ed. 2005).


11 A siting certificate is defined in the West Virginia Code of State Rules as a “certificate issued by the [Commission] authorizing the construction and/or operation of an electric generating facility . . . .” W. VA. CODE R. § 150-30-1.5(b) (2005).

12 See W. VA. CODE R. § 150-30-2.2 (2005) for more details on the required contents of the application.


14 W. VA. CODE § 24-1-1(b) (1986).

15 Id. § 24-2-1(a) (1986).

In a document submitted to the Joint Committee on Government and Finance, the Commission has stated that the “purpose of the Siting Rules is to collect information about a project for the public and for the Commission to review that information.” This statement reiterates the Commission’s requirement to protect the public interest under West Virginia Code section 24-1-1. Therefore, when ruling on a proposed wind-powered electric generation facility, the Commission must try to balance all the parties’ interests while protecting the public interest.

In addition to state regulation, the Federal Government is sometimes involved in the permitting process for transmission line siting. The Federal Energy Regulatory Commission (FERC) is the government agency that oversees federal regulation of energy projects. However, FERC’s permit process for transmission line siting is for “[o]nly electric transmission facilities proposed to be located in National Interest Electric Transmission Corridors . . . .” Even where a project does fall under FERC’s jurisdiction, the state still has primary authority over the siting certificate permitting process. Because the wind-powered generation facility discussed in this Note was not reviewed by FERC, the federal regulation of transmission line siting will not be reviewed in further detail—the brief overview provided thus far is sufficient for purposes of this Note.

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17 Id.
22 If the project is located within one of the National Interest Electric Transmission Corridors designated by the Department of Energy, an applicant can initiate a siting certificate application with FERC only after trying to obtain state approval for more than one year. FEDERAL ENERGY REGULATORY COMMISSION, A GUIDE TO THE FERC ELECTRIC TRANSMISSION FACILITIES PERMIT PROCESS, 6, available at http://www.ferc.gov/for-citizens/citizen-guides/electric/guide-transmission-8-08.pdf. Moreover, FERC states that, where a permit is subject to both state and federal regulation, “[t]he State and its record of proceedings play a considerable role in FERC’s deliberations. States have the primary role in siting transmission facilities. FERC’s role is clearly secondary—that of a backstop—to state permitting.” Id. at 4.
B. Overview of Beech Ridge Wind Power Project

The Beech Ridge wind-generating facility project has an extensive legal background in the courts. On November 1, 2005, Beech Ridge filed an application for a siting certificate with the Commission for a wind-powered electric generation facility in Greenbrier County, West Virginia.\(^\text{23}\) In its application, Beech Ridge stated that it selected the proposed location based on the local terrain and wind speeds as well as distance from "environmentally or culturally sensitive areas."\(^\text{24}\) Beech Ridge proposed to build 124 wind turbines spanning an area of twenty-three miles.\(^\text{25}\) After Beech Ridge filed its application for the siting certificate, the Commission received numerous comments from the public; the majority of these comments opposed the proposed project.\(^\text{26}\)

On August 28, 2006, the Commission issued an order conditionally granting the siting certificate.\(^\text{27}\) The Commission placed numerous pre-construction and construction conditions on Beech Ridge; however, this Note will focus on only one of the pre-construction conditions.\(^\text{28}\) This condition\(^\text{29}\) required Beech Ridge to file "evidence of any necessary environmental permits and/or certifications" before beginning construction on the generation facility.\(^\text{30}\)

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\(^\text{24}\) Id. at 319 n.3.

\(^\text{25}\) Id. at 319.

\(^\text{26}\) Id. These comments incorporated environmental concerns, possible negative impacts to individual properties and areas of possible cultural and historical impacts, and various other concerns. Id.

\(^\text{27}\) Mountain Cmtys., 665 S.E.2d at 320.

\(^\text{28}\) The Commission’s August 28, 2006, Order identified numerous Pre-construction and Construction Conditions. These conditions included a list of various types of actions that had to be completed by Beech Ridge before it could begin construction of the wind-powered generation facility. Below is a list of the types of actions that had to be completed by Beech Ridge:

(a) comply with other laws (such as local noise ordinances, fire safety codes, federal environmental regulations, etc.);

(b) obtain electric wholesale generator ("EWG") status from FERC so that the West Virginia Code of State Rules are indeed applicable to the project;

(c) complete and file interconnection agreements for service;

(d) obtain required permits from other state agencies; and

(e) submit a compliance filing with the Commission notifying it that the pre-construction requirements have been completed.

\(^\text{29}\) The condition discussed in this Note is listed as condition number eleven in the Commission’s August 28, 2006, Order. See id. at *180.

\(^\text{30}\) Mountain Cmtys., 665 S.E.2d at 320.
The Commission explicitly stated that this condition included compliance with the rules or laws of the West Virginia Division of Cultural History’s SHPO.\footnote{See Beech Ridge Energy, No. 05-1590-E-CS (reopened), 2007 W. Va. P.S.C. LEXIS 97, at *124 (W. Va. P.S.C. 2007).}

In response to this order, various interested parties filed Motions for Reconsideration.\footnote{See Petitions for Review filed on February 12, 2007, in Case No. 33375 and on February 12, 2007, in Case No. 33376.} The Motions for Reconsideration addressed an array of issues, including the claim that the historical and cultural information contained in the application was insufficient.\footnote{Mountain Cmtys. for Responsible Energy v. Pub. Serv. Comm’n, 665 S.E.2d 315 (W. Va. 2008).} After reviewing the motions for reconsideration, the Commission issued a final order on January 11, 2007, declining to reconsider its August 2006 order and affirming the conditional granting of the siting certificate.\footnote{Id. at 328.} In its January 2007 order, the Commission directed Beech Ridge to notify the Commission when all pre-construction conditions had been met.\footnote{Id.} The Commission stated in its order that it would schedule a hearing at that time to determine whether Beech Ridge had actually complied with the necessary conditions.\footnote{Id.}

Two appeals of the Commission’s August 2006 and January 2007 orders were filed with the West Virginia Supreme Court.\footnote{See October 15, 2008, and October 16, 2008, Hearing Transcripts on file with the Commission in Case No. 05-1590-E-CS.} On June 23, 2008, the West Virginia Supreme Court affirmed the Commission’s orders conditionally granting the siting certificate.\footnote{See Beech Ridge’s Compliance Filing submitted to the Commission on August 6, 2008, in Case No. 05-1590-E-CS.} During the Commission’s oral argument in the appeals case, the Commission “declared . . . that the [parties would] be afforded an additional opportunity to present their concerns during a . . . compliance hearing.”\footnote{Id. at 328.} The West Virginia Supreme Court specifically stated that the parties would be able to evaluate Beech Ridge’s compliance with the pre-construction conditions, including the SHPO condition.\footnote{Id.}

Beech Ridge notified the Commission on August 6, 2008, that it had completed the pre-construction conditions.\footnote{See Case Docket Sheet for Case No. 05-1590-E-CS on file with the Commission.} A compliance hearing was held in October 2008.\footnote{See id.} Parties were restricted in the issues that they were permitted to address at the compliance hearing and could focus only on Beech Ridge’s com-

\footnote{\textit{Id.}}
pliance with the pre-construction conditions. The Commission stated that the purpose of the hearing was not to review the impact on the community. In its order following the compliance hearing, the Commission found that Beech Ridge had successfully complied with all of the pre-construction conditions, including its condition to obtain SHPO approval. However, in that order, the Commission stated that it did “not have authority to overrule the SHPO’s determinations relating to matters of culture and history” and, therefore, could not provide a valid opportunity for the public to contest any information submitted only to the SHPO. The Commission denied motions for reconsideration, and the West Virginia Supreme Court denied review of the order. Litigation on other issues has continued in other courts; however, these cases involve environmental concerns not addressed in this Note.

III. ANALYSIS

This Note will focus on various issues contained in two sets of orders: (1) the August 2006 and January 2007 Commission Orders, and (2) the West Virginia Supreme Court’s June 2008 Order. The two issues proposed and discussed below are the following: (1) the Commission failed to meet its statutory requirements to review a complete application and to protect the public interest, and (2) the conditional granting of the siting certificate negatively impacted the public’s ability to comment on areas of historical and cultural significance that might be impacted by the Beech Ridge project.

The West Virginia Supreme Court has held that interpretation of a “statute or an administrative rule or regulation presents a purely legal question sub-

43 Transcript of October 16, 2008, Compliance Hearing at 109, Beech Ridge, No. 05-1590-E-CS. During the compliance hearing, the Commission stated that the hearing was restricted to Beech Ridge’s compliance with the conditions expressed in the Commission’s order. The Commission specifically stated that the parties’ concerns with the adequacy of SHPO procedures would not be explored unless the parties provided supporting evidence. Id. at 96.


45 Id. at *87. The Commission further stated that “the Commission’s compliance proceeding is not an opportunity to go behind the SHPO decision.” Id. at *51.


49 See infra Part III for more details on these arguments.
In this case, the Commission's order rests on the interpretation of various statutory language—primarily, the West Virginia Code of State Rules and the West Virginia Code. Therefore, the correct standard of review is de novo.\footnote{Mountain Cmtys. for Responsible Energy v. Pub. Serv. Comm'n, 665 S.E.2d 315, 323 (W. Va. 2008) (quoting Syl. pt. 1, Appalachian Power Co. v. State Tax Dept., 466 S.E.2d 424 (W. Va. 1995)).} Because the West Virginia Supreme Court should have conducted a non-deferential review of the Commission's orders, the errors discussed throughout this Note were errors in the original Commission orders as well as the errors of the West Virginia Supreme Court.\footnote{In the order, the West Virginia Supreme Court stated that three factors must be examined in a review of a Commission's order: (1) whether the Commission exceeded its statutory jurisdiction and powers, (2) whether there is adequate evidence to support the Commission's findings, and (3) whether the substantive result of the Commission's order is proper. Mountain Cmtys., 665 S.E.2d at 323 (relying on Cent. W. Va. Refuse, Inc. v. Pub. Serv. Comm'n, 438 S.E.2d 596, 597 (W. Va. 1993)). See also Syl. pt. 2, Monongahela Power Co. v. Pub. Serv. Comm'n, 276 S.E.2d 179 (W. Va. 1981). In reviewing a Public Service Commission order, we will first determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. We will examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence. Finally, we will determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable. The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors. Id. The West Virginia Supreme Court's decision fails to specifically analyze the Commission's order according to these elements; however, that is not relevant because the court should have applied a different standard. When a case involves interpretation of an agency's rules or regulations, the court applies the de novo standard of review discussed above. In fact, even if the abuse of discretion standard of review was correct, the West Virginia Supreme Court should still have found the Commission's decision to be in error because the Commission abused its discretion by reading a discretionary meaning into the word "shall." See Mountain Cmtys., 665 S.E.2d at 332 (Starcher, J., dissenting).}
A. The Orders Were in Error Because the Commission Failed to Meet its Statutory Requirements

The duties and powers assigned to the Commission by the West Virginia Legislature must be examined to determine whether the Commission’s conditional granting of the siting certificate was an abrogation of its statutory mandates. Statutory language pertaining to the application itself is also relevant to such an inquiry because that language determines the sufficiency of the information submitted to the Commission for its review. A significant issue in the case is whether Beech Ridge’s application had enough information when the Commission made its ruling; an application must be complete for the Commission to be able to fulfill its statutory requirement of balancing the interests of all the parties while also protecting the public interest.\footnote{See W. VA. CODE § 24-2-11c(c) (2008).} Where the Commission’s duties include a primary focus on the public interest, the SHPO requirements are not a sufficient replacement for Commission review because they do not provide for public comment.

i. The Commission’s Duties and Powers Require the Commission to Protect the Public Interest

The primary purpose of the Commission is to serve the interests of the public.\footnote{City of S. Charleston v. Pub. Serv. Comm’n, 514 S.E.2d 622, 622 (W. Va. 1999). See also Boggs v. Pub. Serv. Comm’n, 174 S.E.2d 331, 331 (W. Va. 1970).} The Commission was “created by the [l]egislature for the purpose of exercising regulatory authority over public utilities . . . [and] to require such entities to perform in a manner designed to safeguard the interests of the public . . . .”\footnote{Boggs, 174 S.E.2d at 336. See also syl. pt.1, W. Va.-Citizen Action Grp. v. Pub. Serv. Comm’n, 330 S.E.2d 849 (W. Va. 1985).} The West Virginia Supreme Court has ruled that the West Virginia Legislature “has authorized [the Commission] to exercise the predominant power of the state with respect to such utilities, in order that the facilities . . . shall not be contrary to law.”\footnote{Delardas v. Morgantown Water Comm’n, 137 S.E.2d 426, 433 (W. Va. 1964).} Therefore, it is the Commission’s duty to serve the interests of the public as well as to ensure that power facilities in the state comply with all of the necessary laws.

Under West Virginia Code section 24-2-11c(c), the Commission is given clear direction on its powers in granting siting certificates:

The [C]ommission may issue a siting certificate only if it determines that the . . . construction of the facility or material modification of the facility will result in a substantial positive impact on the local economy and local employment. The [C]ommission shall issue an order that includes appropriate...
findings of fact and conclusions of law that address each factor specified in this subsection. All material terms, conditions and limitations applicable to the construction and operation of the proposed facility or material modification of the facility shall be specifically set forth in the [C]ommission order. 58

However, a beneficial economic impact on the local community is not the only information that the Commission is required to examine in its review of a siting certificate application. As stated above, the Commission’s primary purpose is to protect the public interest. 59 The public has an interest in more than simply the economic health of its community. As implied by the historical and cultural information requirements in an application, the public also has an interest in preserving areas of historical or cultural significance in its community.

ii. The Siting Certificate Application Must be Complete

The West Virginia Rules Governing Siting Certificates for Exempt Wholesale Generators 60 stipulate that an application must contain certain information for review by the Commission. 61 An applicant is required to file environmental information with a siting certificate application. 62 In particular, this environmental information must include a description of the expected impacts of construction of the proposed generation facility within both a one-mile and a five-mile radius of the project location. 63 In addition, an applicant must include noise information in the application; as explained in some of the filings in the Beech Ridge project case, this noise information is relevant to the effect the project will have on cultural and historical areas near the project. 64 The applica-

58 W. VA. CODE § 24-2-11c(c) (2008).
59 Id. § 24-1-1.
60 Even though Beech Ridge was not considered an Exempt Wholesale Generator at the time of its siting certificate application, the West Virginia Rules Governing Siting Certificates for Exempt Wholesale Generators applies where an “electric generating facility to be located in West Virginia . . . has been designated as an exempt wholesale generator under federal law, or will be so designated prior to commercial operation of the facility.” W. VA. CODE R. § 150-30-1.5.a (2005) (emphasis added). In its August 2006 and January 2007 Orders, the Commission stipulated, as a pre-construction condition, that Beech Ridge must obtain Exempt Wholesale Generator Status from FERC for the conditional siting certificate to remain effective. See Commission’s August 28, 2006, Order Conditionally Granting Siting Certificate to Beech Ridge Energy in Case No. 05-1590-E-CS. Beech Ridge filed a Notice of Self-Certification of Exempt Wholesale Generator Status with FERC on December 12, 2007 under Docket No. EG08-23. On March 31, 2008, FERC issued a Notice of Effectiveness of Exempt Wholesale Generator Status stating that the status was effective as of February 2008, pursuant to FERC Regulations under 18 C.F.R. § 366.7(a). See Docket Sheet for Case No. EG08-23 on file with FERC.
62 Id. § 150-30-3.1.m (2005).
63 Id. § 150-30-3.1.m(3)(B)(1)-(2) (2005).
64 Id. § 150-30-3.1.m(4) (2005).
tion must also contain information on the cultural impact of the proposed project. In particular, the applicant must "estimate the impact of the proposed . . . facility on the preservation and continued meaningfulness of any historic, scenic, religious or archaeological areas or places . . . ."

The Commission argued that it has discretionary power to determine that an application is not incomplete, even if it is missing information listed in the West Virginia Code of State Rules. However, the West Virginia Code of State Rules stipulates that "a completed application shall include" the information listed in the Rules Governing Siting Certificate for Exempt Wholesale Generators. The word "shall" has often been synonymous with "must" in the legal realm. For example, Black's Law Dictionary states that, "under strict standards of drafting," the only acceptable definition of this word is to have a duty or to be required to complete the specified action. Moreover, the West Virginia Supreme Court has found that "shall" has a separate and distinct meaning from the word "may." Therefore, the Commission's interpretation of the application requirements as being merely guidelines as opposed to mandatory requirements is not accurate. Such an interpretation would be accurate only if the Siting Rules used the word "may." Therefore, because the Siting Rules use the word "shall," the Public Service Commission's interpretation is not correct.

65 Id. § 150-30-3.1.o (2005). “The applicant shall estimate the impact of the proposed 24-2-1(c) generating facility on the preservation and continued meaningfulness of any historic, scenic, religious or archaeological areas or places; or places otherwise of cultural significance depicted on the map required by Rule 3.1.h.1.” Id. § 150-30-3.1.o(1)(A) (2005). In addition, the applicant shall “[d]escribe any plans to mitigate adverse impacts on these landmarks.” Id. § 150-30-3.1.o(1)(B) (2005).


68 W. VA. CODE R. § 150-30-3.1 (2005) (emphasis added). Under the West Virginia Rules Governing Siting Certificates for Exempt Wholesale Generators, “[a]n applicant for a [s]iting certificate may request a waiver of any of the information requirements of Rules 3.1.a. through 3.1.p. of these Rules that is inapplicable to the proposed [s]iting certificate.” Id. § 150-30-1.6 (2005) (emphasis added). However, this rule does not state that the Commission can require less than a complete application. It specifically states that the only material that can be waived is that which is inapplicable to the project. In this case, the historical and cultural information was applicable to the siting certificate; the Commission merely stated that, because the majority of the information was submitted in Beech Ridge’s application, the application was not incomplete. Beech Ridge Energy, No. 05-1590-E-CS, 2007 WL 4944729, at *26 (W. Va. P.S.C. Jan. 11, 2007). Because neither the Commission’s ruling nor the West Virginia Supreme Court’s decision stated that the missing information was inapplicable to the siting certificate, the decision to allow only partial information was not based on W. VA. CODE R. § 150-30-1.6 (2005).

69 BLACK’S LAW DICTIONARY 1143 (Abridged 8th ed. 2008).


71 See also Justice Starcher’s July 17, 2008 dissent in which he states that the majority decision treats the Commission’s regulations “more like ‘guidelines’ than ‘actual rules.’” Mountain Cmty., 665 S.E.2d at 332 (Starcher, J., dissenting).
An application that “shall” contain certain information is incomplete if it does not contain all of that information.

Beech Ridge argued that the Commission has the power to determine whether or not an application for a siting certificate is complete based upon different statutory language. This argument rests on sections of the West Virginia Code and Rules of Practice and Procedure. Unfortunately, this argument, which the West Virginia Supreme Court accepts, ignores the clear direction of the West Virginia Legislature as expressed in the Code of State Rules. West Virginia Code section 24-2-11c(d) states that “[t]he [C]ommission may require an applicant for a siting certificate to provide such documents and other information as the [C]ommission deems necessary for its consideration of the application.” The word “may” does imply a discretionary power for the Commission to require certain information from the applicant. However, when this code section is read in conjunction with the West Virginia Rules Governing Siting Certificates for Exempt Wholesale Generators, a different interpretation of this language becomes clear: the Commission may require additional information from an applicant.

These rules stipulate that an application “shall” contain certain information for review by the Commission. As stated earlier, the West Virginia Supreme Court has found that “may” and “shall” have separate and distinct meanings. Therefore, this rule cannot mean that the Commission may require the information contained in the Code of State Rules, but rather that an application must contain the information listed in the Rules Governing Siting Certificates described in the Code of State Rules. This information is not optional; it is the minimum that the Commission must require from an applicant and the minimum on which the Commission must base its decision on whether to grant a siting certificate. The discretionary language under West Virginia Code section 24-2-11c(d) described by Beech Ridge in its brief cannot apply to the mandatory materials listed by the West Virginia Legislature in the Code of State Rules. It applies to the Commission’s duties and powers to require “other information” that the Commission might also find helpful in making its decision.

73 Id. at 30.
75 W. VA. CODE § 24-2-11c(d) (2008).
76 See W. VA. CODE R. § 150-30-1.7 (2005) for additional support of this conclusion. “In addition to the information required by Rules 3.1.a. through 3.1.p., upon request of the Commission or Commission Staff, the applicant for a [s]iting certificate shall provide the Commission or Commission Staff with any additional information pertinent to Commission review of the [s]iting certificate.” Id.
77 Id. § 150-30-3.1 (2005).
the Commission has the power to determine whether an application is complete so long as the bare minimum requirements imposed by the West Virginia Legislature under the Code of State Rules have been met.

iii. The Commission Must Review a Complete Application to Meet its Statutory Requirements

Because the West Virginia Code of State Rules stipulates that an application must contain this information, the Commission presumably must review this information when making a ruling on an application. However, the Commission argues that it is not necessary to have all of the information listed in the Rules Governing Siting Certificates for Exempt Wholesale Generators to fulfill its duty under West Virginia Code section 24-2-11c.80 This section of the West Virginia Code is very important because it relates to the Commission's powers and duties. It was added by the West Virginia Legislature in 2003.81 Presumably, this section was added to address a deficiency that was present. Under this section, the Commission "shall appraise and balance the interests of the public, the general interests of the state and local economy, and the interests of the applicant."82 However, the Commission's "primary purpose is to service the interests of the public."83 Therefore, the Commission must adequately weigh the public interest against the interests of the applicant and local and state economy. In fact, the regulations explicitly state that a Commission order must contain "appropriate findings of fact and conclusions of law that address each factor."84

The Commission states that it was in the public interest to grant conditional approval of the siting certificate to allow review by the SHPO and to not delay the proceedings any further.85 It is in the public interest to have expedient decisions in siting certificate proceedings. Presumably, that is one reason that the West Virginia Legislature set minimum requirements for siting certificate applications so that the Commission does not have to wait for the applicant to compile the necessary information during the proceeding. However, the Commission cannot fail to do something it is required to do because an applicant failed to compile all the necessary information in its application. Moreover, it is not in the public interest for the Commission to rush a decision on an applica-

82 W. VA. CODE § 24-2-11c(c) (2008).
84 W. VA. CODE § 24-2-11c(c) (2008).
SILENCING THE PUBLIC'S VOICE

...tion that does not contain all of the required information stipulated in the Code of State Rules and specifically enacted by the West Virginia Legislature.

More importantly, a rushed decision by the Commission does not allow an opportunity for appropriate public comment. Even if the comments by the public do not sway the Commission’s decision in a case, an opportunity to comment is essential to adequately assessing the public interest, which is the Commission’s primary purpose. As discussed in more detail below, the SHPO process does not provide an opportunity for public comment as do the siting certificate proceedings in front of the Commission. “The powers of [a public utility commission or public service commission] are generally exercised by the issuance of orders following a hearing.” But, the Commission failed to have any significant hearing or order on the cultural and historical information in the Beech Ridge application. Because the Commission failed to address the missing cultural and historical information related to the Beech Ridge project, the Commission’s power related to that information is significantly reduced, or even completely removed in some circumstances. Where the Commission’s power has been reduced, so has its ability to protect the public interest. Therefore, the Commission’s argument that it can still preserve the public interest—a requirement under West Virginia Code section 24-2-11c—even if an application does not contain all of the information that the West Virginia Legislature has stipulated it shall simply fails. As such, the Commission erred in finding that it is not necessary to review a complete application.

iv. Beech Ridge’s Application was not Complete Because it did not Provide all the Required Cultural and Historical Information

Commentators have stated that agencies review the sufficiency of the information contained in siting certificate applications to ensure that there is enough information for the public to be able to understand the consequences of the project. In this case there was not sufficient cultural and historical infor-


formation for the Commission and the public to assess the impact that the project would have on the community.

The cultural and historical information contained in the five-mile radius map was the focus of the dispute regarding the sufficiency of the cultural and historical information. In its January 2007 Order, the Commission changed its conclusion of law regarding the map from the August 2006 Order to admit that it was flawed and did not contain all of the relevant information; however, the Commission found that the map did reflect "the majority of the area's cultural and historical interests" and that this was sufficient for purposes of review of the application. The Commission further stated that the SHPO has the requisite knowledge and information to assess the importance of the historical and cultural locations that might be affected by the proposed project. The Commission used this as a basis for the decision to transfer the analysis to the SHPO and to not address the sufficiency of the cultural and historical information in the map any further. However, as discussed in the previous Section, this argument fails to recognize that the Commission is required to examine a complete application—an application with an admittedly flawed map is not complete.

The Commission reasoned that it would be inefficient to require an applicant to coordinate with the SHPO prior to applying for a permit with the Commission and that it would be within the public interest to have the Commission process an application for a siting certificate as expeditiously as possible. However, a "stream-lined" process is not in the public interest if it removes the public's opportunity to comment on the application. The West Virginia Code of State Rules specifically addresses the issue of requirements of other agencies in connection with the Commission's activities. "In the event [an] applicant fails to obtain required permits from . . . applicable government agencies within 100 days of the date the application is filed, the Commission may issue a [s]iting certificate contingent upon receipt of such permits/approvals." However, an

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90 Id.
91 Id.
92 Id.
93 This case involved some discussion as to whether the nine-tenth inch scale format permitted by the Commission was sufficient or resulted in a flawed map where the requirements listed a one inch scale format. See Commission’s August 28, 2006, Order Conditionally Granting Siting Certificate to Beech Ridge Energy, at 18, in Case No. 05-1590-E-CS. The Commission permitted this size difference so that the map would fit on one page. Id. This Note does not discuss this formatting difference; instead, it focuses on the admitted lack of historical and cultural information.
96 Id. § 150-30-5.1 (2005).
applicant must demonstrate a good faith effort to obtain those permits and approvals; "applicants must demonstrate to the Commission that they are working in good faith to complete the requirements of sister state agencies." The Commission found that Beech Ridge was working in good faith with the SHPO because it had been corresponding with the agency.

However, the Commission's reliance on this statute fails to recognize that the rule refers to the date of the application as the starting point for the 100 day requirement. In this case, this statute should not be applied because the application was not complete. The West Virginia Legislature assumes that the statute will be relied upon only after the Commission has had time to review all of the information required in the application. The West Virginia Legislature anticipates that the Commission will review the complete, minimum application requirements before allowing another agency to make a final decision regarding a generation facility. In this case, the Commission admits that it had only the majority of the historical and cultural information. Therefore, the Commission could not adequately determine if it would be acceptable to conditionally grant the siting certificate based upon the SHPO's future acceptance because it did not have all of the cultural and historical information in Beech Ridge's siting certificate application.

In this case, all the parties agree that there were problems with the required five-mile map containing cultural and historical information in the

98 Id.
100 Under the West Virginia Code of State Rules, "[t]he applicant shall supply . . . a [five]-mile radius [map] . . . showing certain features." Id. § 150-30-3.1.h(1)(A)-(G). The features include the following items:
   A. Major population centers and geographic boundaries;
   B. Major transportation routes and utility corridors;
   C. Bodies of water which may be directly affected by the proposed 24-2-1(c) generating facility;
   D. Topographic contours;
   E. Major institutions;
   F. Incorporated communities; public or private recreational areas, parks, forests, hunting or fishing areas, or similar facilities; historic scenic areas or places; religious places; archaeological places; or places otherwise of cultural significance, including districts, sites, buildings, structures and objects which are recognized by, registered with, or identified as eligible for registration by the National Registry of Historic Places, or any state agency; [and]
   G. Land use and classifications; including residential, urban, manufacturing, commercial, mining, transportation, utilities, wetland, forest and woodland, pasture and crop land.


Id.
The application is not complete if the required map is flawed. "Historic, sacred, and archaeological sites and settings must be regarded as sensitive sites." Therefore, the Commission’s argument that the map was sufficient on the basis that it listed the majority of the relevant sites fails because each historical and cultural site is important. If the map is flawed and does not contain all of the relevant cultural and historical information, then the Commission is not able to review all the cultural and historical information that the West Virginia Legislature intended the Commission to review before making a ruling on a siting certificate application. Because the Commission admittedly did not review all the cultural and historical information relevant to this project, it is not acceptable for the Commission to allow less than the minimum information for the application. The Commission does not have the discretionary authority to deem an application complete if it does not contain all of the information that the West Virginia Legislature listed in the mandatory application requirements under the West Virginia Code of State Rules. Therefore, Beech Ridge’s application was incomplete because it did not contain all of the required information on the contested map. Because Beech Ridge’s application was incomplete, the rulings by the Commission and the West Virginia Supreme Court that the map was sufficient were in error.

B. The Orders Were in Error Because the Commission is Required to Review Significant Cultural and Historical Information, not Merely Defer to the SHPO

A complete siting certificate application includes cultural and historical information intended for Commission review and public comment by the West Virginia Legislature. The West Virginia Supreme Court stated that “certain information . . . simply cannot be supplied until after the process has been completed and is more appropriate for another agency to carefully consider.” In this case, the West Virginia Supreme Court seems to be implying that the SHPO is better suited to review the cultural and historical information when it states that “Beech Ridge must receive final approval on matters of culture and history as required by [the SHPO] prior to beginning construction.” However, this reasoning should not serve as a basis for overruling the West Virginia Legislature and permitting less than a full application to be reviewed by the Commission before it defers to the SHPO. The failure to review the full application

102 COMMITTEE ON ENVIRONMENTAL IMPACTS OF WIND-ENERGY PROJECTS, ENVIRONMENTAL IMPACTS OF WIND-ENERGY PROJECTS 156 (Nat’l Academies Press 2007).
105 Id.
removes a level of review that the West Virginia Legislature deemed necessary, as evidenced by the creation of the requirement.

The Commission argued to the West Virginia Supreme Court that its decision to place a condition on the siting certificate that Beech Ridge obtain SHPO approval added an additional level of review to the process and allowed for greater protection of the public interest. However, the opposite is actually true; the Commission's decision to not closely review the cultural and historical information actually removed a level of review in the siting certificate process in addition to decreasing the level of protection of the public interest. Although the SHPO is likely more qualified to review the cultural and historical impact than the Commission of the courts, the SHPO is not under the same mandate to protect the public interest. Therefore, because the Commission failed to review the complete application, the cultural and historical information was never reviewed with the impact to the community as a whole or to the public interest in mind. As such, this level of review was completely removed in this case.

The pre-construction condition relating to the SHPO stated the following:

Beech Ridge must file with the Commission evidence of any necessary environmental permits and/or certifications prior to commencing construction (including any letters from U.S. Fish & Wildlife, West Virginia Division of Natural Resources, W. Va. Division of Culture and History and West Virginia [SHPO] indicating either that Beech Ridge does not need to take further action or outlining what action Beech Ridge needs to take to be in compliance with that agency's rules/laws).

The use of the word "necessary" implies that the permits and certifications to which the Commission refers are items which Beech Ridge would be required to obtain whether or not the Commission placed them as a pre-construction condition in its August 2006 and January 2007 orders. Therefore, the Commission has not added anything new to the siting certificate process; it merely requires that the permits and certifications be complete before construction starts. Not only has the Commission failed to add a level of review, but it has also managed to remove a level of review from the siting certificate process—its own independent review of the information. Because the Commission failed to review all of the information that it was statutorily mandated to review, the orders were in error.

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106 Id. at 327.

C. The Orders Were in Error Because Policy Concerns Dictate that the Commission Should not Defer to the SHPO Until it has First Reviewed all the Required Historical and Cultural Information

The Commission’s failure to review a complete application deprived the public of the right to comment. Moreover, this injury was exacerbated by the SHPO procedures because there was also no opportunity to comment in those proceedings. Because the public’s opportunity to comment before the SHPO was limited—or rather, nonexistent—in this case, policy concerns dictated that the Commission be required to review all of the relevant cultural and historical information before conditionally granting a siting certificate application upon approval by the SHPO.

i. The SHPO Requirements are not a Sufficient Replacement for Commission Review Because They do not Provide for Public Comment

Although, in some circumstances, “members of the public with interest in or knowledge of an undertaking will have the opportunity to notify the Division of Culture and History and will have a reasonable opportunity to participate in the review process” under the West Virginia Code of State Rules, the Division of Culture and History was not required to allow public involvement in this case. This public involvement requirement is relevant only in the State Review Process described in the Standards and Procedures for Administering State Historic Preservation Programs—in other words, for “lands owned or leased by the state, or on private lands where investigation and development rights have been acquired by the state by lease or contract . . .” In this case, the land on which the turbines were proposed to be built is owned by MeadWestvaco Cor-


\[109\] W. VA. CODE R. § 82-2-5.1 (2009). The following is the full statutory language under this section:

The Division of Culture and History will review all undertakings permitted, funded, licensed or otherwise assisted, in whole or in part, by the state for the purposes of furthering the duties outlined in W. Va. Code § 29-1-8. The following review process will be conducted on lands owned or leased by the state, or on private lands where investigation and development rights have been acquired by the state by lease or contract as outlined in W. Va. Code § 29-1-8b. Permit approval of activities affecting historic properties will be demonstrated by written letter from the Division of Culture and History upon completion of the review process.

Id.
poration. Because the land is privately-owned and the state does not own development rights, the State Review Process described above is not required. However, simply because a wind-generating facility is located on private land, there is no reason to believe that the facility does not impact other nearby areas such as areas of cultural or historical significance to either individual residents or the local community as a whole.

The Division of Culture and History is still required to perform its historic preservation duties under the West Virginia Code:

The purposes and duties of the historic preservation section are to locate, survey, investigate, register, identify, preserve, protect, restore[,] and recommend to the [Division of Culture and History Commission] for acquisition historic, architectural, archaeological and cultural sites, structures and objects worthy of preservation . . . relating to the State of West Virginia and the territory included therein from the earliest times to the present upon its own initiative or in cooperation with any private or public society, organization or agency; to conduct a continuing survey and study throughout the state to develop a state plan to determine the needs and priorities for the preservation, restoration or development of the sites, structures and objects; to direct, protect, excavate, preserve, study or develop the sites and structures; to review all undertakings permitted, funded, licensed or otherwise assisted, in whole or in part, by the state for the purposes of furthering the duties of the section; to carry out the duties and responsibilities enumerated in the National Historic Preservation Act of 1966, as amended, as they pertain to the duties of the section; to develop and maintain a West Vir-


111 See W. VA. CODE § 29-1-8 (2009) (citation omitted) (stating that one of the “purposes and duties of the historic preservation section” is “to carry out the duties and responsibilities enumerated in the National Historic Preservation Act of 1966, as amended, as they pertain to the duties of the section”). In particular, “Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings.” 36 C.F.R. § 800.1a (2009). The Act defines an undertaking as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.” 36 C.F.R. § 800.16y (2009). In this case, there was no Federal agency involved in the project; therefore, it was not an undertaking under the National Historic Preservation Act. See id. Because the SHPO was not required to complete a full section 106 process, there was no requirement to provide for public comment. See 36 C.F.R. § 800.2(d) (2009), which stipulates that the public must be included as a participant to the section 106 process if a section 106 process is required for an undertaking. 36 C.F.R. § 800.2(d) (2009) (emphasis added).
The Virginia State Register of Historic Places for use as a planning tool for state and local government; to cooperate with state and federal agencies in archaeological work; . . . and to perform any other duties as may be assigned to the section by the [Division of Culture and History Commissioner].

Unfortunately, these duties do not require the allowance of public involvement, and interested parties in the Commission siting certificate proceedings were not afforded an opportunity to address any concerns that they had in front of the SHPO. A full impact assessment is not possible where all of the interested parties are not given equal opportunity to comment. The Committee on Environmental Impacts of Wind-Energy Projects has stated that important aspects of a thorough impact assessment include examination of benefits, negative impacts, and different values and levels of sensitivity of various individuals. The only way to acquire all of this information is to provide an opportunity for public comment. In addition, commentators have stated that “despite the tremendous importance of a wind-energy project’s aesthetic impacts, especially on nearby residents, this issue is too often inadequately addressed.” This becomes a major concern where certain individuals are not provided the opportunity to comment in front of the agency completing the impact assessment.

Furthermore, the SHPO’s website states the Review and Compliance program cannot stop project development. Therefore, even if adverse impacts are identified by the SHPO, the SHPO does not view itself as having the ability to stop the development of a project. This is an important factor that the Commission and the West Virginia Supreme Court should have considered in their orders. The wording in the Memorandum of Agreement (“MOA”) reached between the SHPO and Beech Ridge also reflects the SHPO’s belief that it has little power to limit the construction of the project. For example, the MOA stated that Beech Ridge had “afforded [the SHPO] an opportunity to comment on the Project and its effects on historic properties” and that Beech Ridge had fulfilled its obligation under the pre-construction conditions to “coordinate” with the SHPO. The use of the words “afforded” and “coordinate” implies a

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113 Transcript of October 16, 2008, Compliance Hearing at 33, Beech Ridge Energy, L.L.C., No. 05-1590-E-CS (2008). A complaining party stated that “we don’t have an opportunity to litigate this before the SHPO. To my knowledge, they don’t have any administrative proceedings, no hearings. So this is the tribunal before which we have to litigate this.” Id.
114 COMMITTEE ON ENVIRONMENTAL IMPACTS OF WIND-ENERGY PROJECTS, supra note 102, at 140.
115 Id. at 144.
117 See Beech Ridge’s Aug. 6, 2008, Compliance Filing, Tab 20 at 6,No. 05-1590-E-CS (2008).
The relationship between entities of equal status; this language does not demonstrate an authoritative role by the SHPO in the review process.

The Committee on Environmental Impacts of Wind-Energy Projects has stated that “[i]n analyzing impacts on historic, sacred, and archeological sites, the primary concern is that no permanent harm should be done that would affect the integrity of the site.”118 If the SHPO does not view itself as having authority to stop a development project, then the risk for permanent harm increases significantly. As such, the application review process for the Commission, set in place by the West Virginia Legislature under the Code of State Rules, is not something that the Commission can hand off to the SHPO and still maintain its duty to preserve public interest.

ii. Public Involvement is Important Because Impacts by Wind Projects are not Well Documented

Because “[m]ost states are only now beginning to develop methods for reviewing onsite and offsite impacts of wind-energy facilities on historic sites,”119 it can be difficult for the SHPO to identify adverse effects of a wind project. Noise is a common concern in communities where wind turbines are placed.120 The noise that wind turbines produce is usually “foreign to the rural settings where wind turbines are most often used.”121 This can have an adverse impact on areas of cultural or historical significance.122 Unfortunately, the impacts that a wind project might have on the experience of an individual at a historic site “from either seeing or hearing a wind-energy project nearby are not . . . well documented.”123 Because the impacts can be difficult to assess, there is an increased need for public comment. Unfortunately, the SHPO review process did not provide an opportunity for public comment.124

iii. The Public has an Interest in Adverse Effects Identified by the SHPO

Even though it can be difficult to identify all of the adverse impacts of a wind project, in its review, the SHPO was able to identify twenty-one culturally or historically significant areas that would be adversely impacted by the Beech

118 COMMITTEE ON ENVIRONMENTAL IMPACTS OF WIND-ENERGY PROJECTS, supra note 102, at 155.
119 Id. at 156.
121 Id.
122 Id.
123 COMMITTEE ON ENVIRONMENTAL IMPACTS OF WIND-ENERGY PROJECTS, supra note 102, at 155.
Ridge project. However, even after identifying adverse impacts, it can be difficult for the SHPO to determine how to adequately mitigate the damage caused by wind projects. In this case, the SHPO entered into a MOA with Beech Ridge which stipulated that Beech Ridge must provide $10,000 for historical preservation in the affected area.125 Unfortunately, the public was not provided an opportunity to participate in any conversations regarding mitigation efforts.126

Interested persons were not able to provide public comment regarding various cultural and historical data, including the following: (1) the SHPO’s review of the affected areas, (2) the SHPO’s identification of adverse effects to those areas, and (3) Beech Ridge’s and the SHPO’s proposed mitigation efforts to the identified adverse impacts. Because interested persons were not given an opportunity for participation in the SHPO review process, the Commission’s reliance on the SHPO was not sufficient protection of public interests—a duty that the Commission must perform.127 Because the SHPO is not under the same obligation to preserve the public interest, this failure does not reflect upon the SHPO’s work. The failure belongs to the Commission, as well as the West Virginia Supreme Court when it affirmed the Commission’s decision to allow a less than thorough review of the cultural and historical information by the Commission before passing the decision off to the SHPO.

iv. The Commission Needs to Allow Public Comment for Areas of Public Interest

The National Historic Preservation Act (NHPA) is the major piece of legislation that directs the SHPO’s activities.128 It directs that “the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people.”129 It further states that “the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.”130 The federal determination that

129 Id. § 470(b)(2) (2006).
130 Id. § 470(b)(4) (2006).
preservation of areas of cultural or historical significance is in the public interest means that it is a factor that must be fully addressed by the Commission when considering the public interest. It is not sufficient for the Commission to shift this responsibility to the SHPO because the SHPO is not required to preserve the public interest and is required to perform its review under NHPA’s mandates only in limited circumstances. Therefore, the Commission must fulfill a thorough review of a complete application—with all relevant cultural and historical information—before it can defer to another agency’s decision on the matter. As such, the Court was in error to determine that the Commission fulfilled its statutory requirements in connection to its review of cultural and historical information by merely deferring to the SHPO’s review.

IV. ADVERSE IMPACTS ON THE FUTURE

In addition to being in error and harming the litigants in a specific case, the orders create adverse effects on future proceedings. These adverse effects may lead to irreparable harm to areas of cultural and historical significance.

A. The Orders Promote Failure by the Commission to Fulfill all Statutory Duties

The West Virginia Supreme Court’s decision supports the Commission’s practice to conditionally grant siting certificates. Therefore, the Commission is not encouraged to review all relevant (and statutorily required) information in current and future siting certificate applications when assessing impact and balancing public and private interests. The interpretation of the word “shall” as having a discretionary, non-obligatory meaning for the Commission’s duties can lead to similar interpretations in other sections of the West Virginia Code.

B. The Orders Permit Siting Certificate Applicants to Submit Incomplete Applications

Parties in the case expressed concern over the Commission’s reliance on maps that do not accurately reflect the area. The Commission’s decision, as well as the West Virginia Supreme Court’s order upholding that decision, essentially states that an applicant need only include a majority of the cultural and historical items in its map(s). An applicant, therefore, can ignore important

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historical or cultural items if the utility need only include the majority of the relevant items or areas in its application. Over time, utilities might learn to selectively remove the most important items or areas from its application so as to decrease public opposition to those things.

C. The Orders Create a Self-Fulfilling Prophecy at the SHPO in Cases Involving Conditional Granting of Siting Certificates

The Commission’s conditional granting of a siting certificate might apply pressure to the SHPO to approve something it would not otherwise approve. The SHPO does not anticipate using its review process as a way to stop development; therefore, by conditioning approval of the siting certificate upon the subsequent approval of the SHPO, the Commission creates an environment in which its approval will be mimicked in the SHPO review process—a type of self-fulfilling prophecy. If the SHPO does not anticipate stopping development, then it will likely feel forced to merely mitigate any adverse effects which the Commission might not have approved if it had reviewed all of the required information. Mitigation efforts are not always sufficient to prevent irreparable harm to the items or areas of historical or cultural significance. Where this conditional approval process leads to irreparable harm to areas of historical or cultural significance, the SHPO is placed in the awkward position of being forced to attempt a superficial mitigation effort.

D. The Orders Significantly Limit the Public’s Voice in Matters of Public Interest

The National Wind Coordinating Committee identifies significant public involvement, particularly in the early stages of the permitting process, as an important step in establishing a successful permitting process. However, after

133 West Virginia Review and Compliance Program, WEST VIRGINIA DIVISION OF CULTURE AND HISTORY, http://www.wvculture.org/shpo/review.html (last visited Oct. 25, 2010) (stating that the SHPO does not have power to stop project development).
135 See NATIONAL WIND COORDINATING COMMITTEE, PERMITTING OF WIND ENERGY FACILITIES (2d ed. 2002), available at http://www.nationalwind.org/assets/publications/permitting2002.pdf. A key feature of a successful permitting process is providing opportunities for early, significant, and meaningful public involvement. The public has a right to have its interests considered in permitting decisions, and without early and meaningful public involvement there is a much greater likelihood of subsequent opposition and costly and time-consuming administrative reviews and judicial appeals.

Id.
the Commission’s decisions and the West Virginia Supreme Court’s order, the public will have no or minimal input in matters of public interest concerning historical or cultural items or areas.

The SHPO review process does not provide for public comment in all cases. Therefore, there is not much opportunity for the public to be able to express any concerns that it might have regarding areas or items of historical or cultural significance. Moreover, even if the SHPO were to begin permitting public comment in cases of siting certificates, it would not be a meaningful opportunity to participate in the review process because the SHPO selects mitigation steps that do not stop development. Because the outcome of the permit process is pre-determined, public feedback would not influence the SHPO’s final determination regarding generation facilities.

In addition to having no involvement during the SHPO process, the public does not have any meaningful opportunity to participate in the Commission’s review of the cultural and historical information in a utility’s siting certificate application. When the compliance hearing for Beech Ridge’s pre-construction conditions took place by the Commission, the Commission did not examine the content of Beech Ridge’s SHPO compliance. The Commission stated that it merely looked to see if an item representing the corresponding pre-construction condition was present in its compliance filing. This is not the same as verifying the level of compliance. Moreover, parties in the case were not provided an opportunity to question the content of Beech Ridge’s SHPO compliance. Where there is no opportunity to appeal with the SHPO, or with the Commission, public comment opportunity and involvement is greatly reduced.

V. POSSIBLE SOLUTIONS TO THE ADVERSE IMPACTS

Regardless of whether the decisions were in error, the Commission’s and the West Virginia Supreme Court’s rulings are now valid precedent in West Virginia. With that in mind, it is now necessary to explore how to prevent or deal with the adverse effects that are a result of these orders. Unfortunately, these proposed solutions would increase the SHPO’s duties and likely require additional state funding.

One possible approach is the creation of zoning districts pre-approved for wind-energy projects. Under this type of approach, districts in the state with minimal areas or items of cultural or historical significance would need to be identified and compiled into a list of districts pre-approved for wind projects by the SHPO. In addition, areas with historically significant items could be placed on a list as requiring more in-depth review. This approach would grant more power to the SHPO to assess the possible impact of a wind-generating facility before a siting certificate has been issued. By moving the SHPO’s participation so that it precedes the issuance of a siting certificate, the SHPO will

136 See PATRICIA E. SALKIN, 4 AM. LAW OF ZONING § 37:9 (5th ed. 2010), for examples of a similar approach in various municipalities.
experience less pressure to approve development plans because it will first be
dealing with only the assessment of the cultural and historical items of interest
in a specific area. By having more information on a general assessment of the
cultural and historical items of interest in a specific area at the time of a siting
certificate application review, the Commission would be able to better estimate
the project’s impact on the public interest. Although this approach would not
provide any additional public comment period, it would at least place the Com-
mission on notice about possible public interest in a specific project. This in-
formation would assist the Commission in achieving its statutory mandate to
protect the public interest.

Another potential solution to the problem created under the current law
is to charge the SHPO with a required public comment period in all cases, not
simply those falling under the NHPA. Unfortunately, this places a significant
time and financial burden on the SHPO and may not be feasible under staffing
or monetary constraints. In addition to such practical limitations on the SHPO,
this process would also have a negative impact for the siting certificate appli-
cant: significant delays in acquiring all of the necessary permits, which could
affect the financial backing of the project.

VI. CONCLUSION

The West Virginia Legislature established the Commission to protect
the public interest in the state’s energy matters. In addition to the clear, un-
ambiguous statutory language expressly stating this purpose, the West Virginia
Code and Code of State Rules include language which supports the determina-
tion that the West Virginia Legislature foresaw the Commission acting on behalf
of the public. Although section 24-2-11c of the West Virginia Code states
that the Commission should balance the interests of all the parties, this language
is intended merely as a check on the Commission’s primary purpose of preserv-
ing the public interest. Sometimes, what is best for the public is not what is
popular with the public. Therefore, by stating that the Commission must bal-
cence the interests, the West Virginia Legislature is reminding the Commission
to not merely do what the majority of the public comments request.

Instead, the Commission must look at the complete picture before mak-
ing its determination on a siting certificate. This, however, is not the same as
looking at the majority of the requirements in a siting certificate application.
The West Virginia Legislature clearly had minimal requirements for the con-

1970).
139 W. VA. CODE § 24-2-11c(c) (2009).
tents of a siting certificate. And, so long as none of the requirements are inapplicable to the particular siting certificate being reviewed by the Commission, all of those minimal requirements must be included in the siting certificate application to be considered complete. The Commission must review a complete application before it can adequately assess and balance the parties' interest, let alone protect the public interest.

Unfortunately, the orders at issue in this Note failed to promote the Commission's main purpose—to protect the public interest. If the Commission does not review a complete application prior to deferring to another agency, then the Commission has failed to examine all of the relevant data that the West Virginia Legislature has deemed important in balancing the interests of the parties. In addition, the conditional granting of a permit subject to approval of related permits by a different agency does not allow the Commission to meet its requirement to protect the public interest under section 24-1-1 of the West Virginia Code where the other agencies do not provide for public comment on areas of public interest. Furthermore, the orders create adverse effects that may lead to irreparable harm to areas of cultural and historical significance. In order to address the problems created by the precedent of allowing the Commission to conditionally grant a siting certificate application based on merely the majority of the cultural and historical information required in the application, the legislature will have to enact new procedures that will provide for public comment, which will likely create more delays as opposed to expediting the siting certificate process.

Michelle Green*

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142 W. VA. CODE § 24-2-11c(c) (2009).

143 See supra Part IV.

144 See supra Part IV.

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