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July 26, 2006

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Sandra Squire, Executive Secretary
Public Service Commission of
West Virginia
P.O. Box 812
201 Brooks Street
Charleston, WV 25323-0812

Re: Case No. 05-1590-E-CS
Beech Ridge Energy LLC

Dear Madam Secretary:

I am submitting the following comments for the public record of this case, and I request that the Commission consider them in deciding whether to grant the siting certificate sought by Beech Ridge Energy LLC. Beech Ridge is an entity that is ultimately owned by a Chicago-based company, Invenergy Investment Company LLC, and the siting certificate that is being sought is for an industrial wind-energy facility on mountain ridgelines in Greenbrier County.

My interest in this case stems from the fact that the issues raised here are very much statewide in nature. The Commission previously approved three wind-turbine projects in my Congressional District. One of those, the Mountaineer project, has been built and is operating, and it appears that absent some change in government policy, the other two, in the Mount Storm area, will be built in the near future. It is evident that wind-energy developers have targeted this state, and that if they are allowed to have their way, thousands of industrial wind turbines will be erected across the mountain ridges of West Virginia. In all likelihood the Commission's decision in this case will play an important role in determining how many additional wind-turbine applications will be submitted in the future, and how those applications will be decided.

I have referred to the past Commission wind-power decisions, and I must also note how much has changed since April 2003, when the Commission last considered an application for a

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wind-turbine project on its merits. To begin with, we now know much more about the serious damage that wind-turbine projects can cause to wildlife and to the environment generally. Indeed, at the time the Commission decided the Nedpower Mount Storm application, the lethal effect that wind turbines erected on mountain ridges have upon bats was virtually unknown.

Moreover, we - and by "we", I mean government officials, environmental experts, industry officials, and the public generally - have also come to have some idea of how much we don't yet know about the environmental impacts of these massive projects. This point was amply made by the report on wildlife impacts of wind energy that the U.S. Government Accountability Office issued last September, which sets out (on pp. 15-20) numerous critical "research gaps" in this area.¹

A number of efforts are underway to fill in the "gaps" in our knowledge in this critical area, so that decisions on proposed wind-turbine projects can be made with reasonably complete knowledge of the projects' environmental consequences. One of those efforts is the study that is now being conducted by a committee of the National Academy of Sciences. The committee held a hearing in Charleston last December,² and it is scheduled to issue its report in December of this year. There is also required environmental information must be obtained on a site-specific basis, and this is a matter I will be addressing in my comments.

Yet another change over the past few years is evidenced by the massive public protest against both this proposed project and the project that had been proposed for Jack Mountain. This outpouring of opposition demonstrates that the public is now far more sensitive to the environmental consequences of these projects, and particularly the significant harm that they cause to scenic mountain views. When the Mountaineer facility was built in 2002, the people of this state were given some taste of the visual impact of a wind-turbine project, and it is probably safe to say that if the massive, Commission-approved Mount Storm

¹ The report is available online at the GAO Web site, at www.gao.gov/new.items/d05906.pdf.

² In connection with its study, the NAS committee sought to visit the Mountaineer facility earlier this year, but Florida Power and Light declined the committee's request, citing security concerns. (The committee was able to visit facilities in California, and thus it is difficult to ascertain what those security concerns might have been.) Of course, since 2004 the company has also refused to allow any further study of bat mortality at Mountaineer. To say the least, conduct such as this illustrates one of the reasons that there are gaps in knowledge of the environmental consequences of wind-energy projects.

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projects had been built as planned in 2003-2004, the protests against this project and the proposed Jack Mountain project would have been even more vociferous.

I am aware that the Commission has received extensive testimony and exhibits from the parties to this case, and that the Commission is statutorily obligated to make a decision on the application not later than August 28th. In these circumstances, I will limit my comments to two basic points:

- **First**, Beech Ridge has entirely disregarded the determinations made by the U.S. Fish and Wildlife Service - the federal agency responsible for administering and enforcing both the Migratory Bird Treaty Act and the Endangered Species Act - on the pre-construction studies that should be done regarding the impact that the project would have on migratory birds and on bats. This conduct in itself warrants denying the application at this time.
- **Second**, focusing solely on the project's impacts upon the State of West Virginia and its people, the clear likelihood is that its negative impacts, particularly the visual impacts on our mountains, would far outweigh any positive impacts that the project would have for our state.

The particulars of these two points are as follows.

Disregard of the Fish and Wildlife Service determinations.

As the Commission is aware, the West Virginia Field Office of the U.S. Fish and Wildlife Service conducted an in-depth review of the proposed Beech Ridge project, and the conclusions it reached under the Migratory Bird Treaty Act and the Endangered Species Act are set out in an 8-page letter dated March 7, 2006. At the time FWS issued that letter, the agency submitted a copy to the Commission for the record in this case.

Among the conclusions set out in that letter are that Beech Ridge should conduct certain very specific, multi-year, pre-construction studies regarding the project's impacts on migratory birds and bats. The letter also sets out in detail the reasons that FWS has concluded that those studies are necessary. Among the points made in the letter are that the estimates of bat mortality at the existing Appalachian wind-energy facilities "are among the highest ever reported in the world," and that FWS concurs with the conclusion of Beech

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Ridge's own consultant that "the Beech Ridge project is likely to result in the same, or greater, mortality"

The FWS letter concludes by stressing the importance of conducting the enumerated studies:

[W]e are concerned about the potential risk that construction and operation of the Beech Ridge wind power facility may pose to bat and bird species residing and migrating through the area, and the resultant cumulative impacts of wind power facilities on ridge tops throughout the eastern United States. There have been few studies in the U.S. that document nocturnal avoidance of wind turbines by songbirds and bats. **We, therefore, find a compelling need for these data at the site-specific scale.** [Emphasis added is in bold type; emphasis in original is underlined.]

Addressing the specified pre-construction studies, FWS stated,

We strongly encourage you to perform the recommended pre-construction studies at the proposed project site in order to identify use by threatened and endangered species, and migratory birds and bats. This information will be critical in assessing possible risks to these species as well as designing means to avoid and minimize any impacts. [Emphasis added.]

As the Commission is also aware, Beech Ridge, in a filing of April 3, 2006, rejected the determinations of FWS with regard to multi-year pre-construction studies, opining that "the studies conducted [by Beech Ridge] to date are sufficient to address the FWS concerns." But it is certainly not open to Beech Ridge to substitute its judgment for that of FWS on issues arising under federal wildlife laws, and, indeed, it is not open to the Commission to substitute its judgment on those issues.

In this regard, as the 2005 GAO Report points out (on p. 34), FWS is the federal agency that is "primarily responsible for ensuring the implementation and enforcement" of the federal wildlife laws, including the Migratory Bird Treaty Act and the Endangered Species Act. The report goes on to note (on p. 35) that "FWS is not only responsible for ensuring the survival of species protected by specific laws, but also for conserving and protecting all wildlife."

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Moreover, it is FWS - not the Commission, and certainly not Beech Ridge - that has the expertise to determine the steps that should be taken to assure that wildlife is accorded appropriate protection, and that federal law is complied with. It appears that Commission officials have in the past acknowledged this very point, for the GAO Report also states (on p. 23),

[O]fficials in West Virginia told us that they did not have the expertise to evaluate wildlife impacts and review studies prior to construction, although such studies are required. Instead, they said they rely on the public comment period while permits are pending for concerns to be identified by others, such as FWS and the state Division of Natural Resources.

The GAO clearly took comments like these very seriously, for the major recommendation made in the report (on p. 44) is that FWS undertake to assist state and local wind-energy regulators in addressing wildlife issues. Of course, the March 7th FWS letter on Beech Ridge is fully consistent with that recommendation.

It should also be noted that, as the FWS letter states, the agency is in no way an opponent of the development of wind energy. To the contrary, the Interior Department, of which FWS is a part, is on record as strongly endorsing the development of wind energy. The fundamental point of the March 7th letter is an entirely reasonable one - that this development should be done in a manner consistent with the terms and the intent of the federal wildlife laws.

The final point to be made here is that in view of all of these considerations, the proper course for Beech Ridge to have followed would have been for the company to present its objections and concerns to FWS, and to attempt to persuade FWS to alter its determinations. Instead of doing that, the company is, in effect, asking the Commission to overrule FWS - an action that the Commission simply is not suited to take.³

³ There is a line in the initial brief of Commission staff that can be read to suggest that the position taken by FWS can be disregarded in that FWS did not file a formal protest to this application. There are at least several responses to any such suggestion. First, the March 7th letter of FWS states the agency's position clearly and fully; its position could not be more clearly or fully stated in a formal protest. Moreover, if staff or any other party believed that further information was required from FWS, it was free to seek that information. Finally, such a suggestion appears to be based at least in part on the notion that the statements made by FWS on matters within the agency's

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The clear indications are that major negative impacts of the project would be felt in West Virginia, but many of its positive impacts would be felt, if at all, only outside the state. When reviewing the facts of this project solely in terms of the interests of this state, it is difficult to avoid the conclusion that the negative impacts of the project would far outweigh its positive impacts.

Quite clearly, one of the major negative impacts would be the environmental and economic costs that would result from erecting a series of huge wind turbines on the ridges of mountains that are prized for their natural beauty. Because of the physical size of the project, an overwhelming visual impact is inevitable. Specifically, Beech Ridge would erect 124 industrial wind turbines across 23 miles of forested mountain ridgelines. Each of the turbines would have a total height of nearly 400 feet, including the massive, three-bladed propeller that would be mounted on the top of each turbine tower.

In an agency that is used to dealing with the data and statistics that are the stock-in-trade of utility and motor carrier regulation, there may be some discomfort in dealing with an issue such as "viewscape," and to brush it aside as being too "subjective." The Commission should not make such a mistake.

In my view, a fundamental proposition here is that the mountains and natural beauty of this state are a resource that warrants careful protection. As the members of the Commission may recall, these treasures were strikingly articulated in a column that appeared about a year ago in, of all places, the *Wall Street Journal*. The column was by Peggy Noonan, who had been a senior aide to President Reagan, and its subject was her first visit to West Virginia. She began by stating that "it is a jewel of a state. It is like an emerald you dig from a hill with your hands." She continued,

You know when you've passed into it from the east because suddenly things look more dramatic. You get the impression you're in a real place. All around you are mountains and hills and gullies, gulches and streams. The woods wherever I went were thick and deep. From Morgantown

jurisdiction are not entitled to deference, and that the Commission may disregard them in favor of testimony of even a financially interested party such as Beech Ridge. For the reasons I have set out, this is certainly not the case.

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to Ballengee a squirrel can jump from tree to tree. It is a tall state - the hills, trees and mountains - and shadowy-dark, with winding roads, except for where it's broad and beige and full of highway, courtesy of Robert Byrd. The highways are perfect looking, unstained by wear and tear, and not many people seem to use them.

Furthermore, this is one instance in which environmental conservation and economic growth are not in conflict with one another, but instead they go hand-in-hand. This is so because the state's tourism industry and second-home market are substantially based on the state's natural beauty. I understand that the case record includes substantial information addressed to this point, but this is a matter of common sense, and common knowledge among the people who live here. I note, for example, that one of the opening lines of West Virginia's Official Visitor's Guide is, "West Virginia's spectacular mountains, swirling rivers, and scenic countryside offer a welcome change of pace from the rush of everyday life."

Because of the clear threat that massive wind-turbine projects pose to this state's natural beauty, it is incumbent on the Commission to give this subject the most serious consideration. I further submit that in order to protect the long-term interests of the people of this state, the Commission should not approve a proposed wind-turbine project unless it is absolutely clear from the case record that the project will not have such negative impacts. It is my understanding that such a showing has not been made in this case - a point that is underscored by the thousands of protests that West Virginians have registered against this project.

Another consideration that I believe is extremely important here is that of the positive impacts claimed for this project, a number of them would be felt, if at all, not within West Virginia, but rather outside the state. For example, with regard to the electricity that the project would generate, the key facts are that - as the brief filed by Commission staff notes - West Virginia now generates more than twice the amount of electricity that the state consumes, and this state has no renewable energy requirement. Accordingly, it is possible that the power generated by this project may positively impact areas outside the state, but it is clearly not a positive impact for West Virginia.

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In addition, a major benefit that is claimed for wind energy is that it is a "clean" source of energy in that it produces no emissions. Again, however, any such benefit would not inure to West Virginians, in that, so far as I am aware, no conventional generating facilities in the state would reduce output upon the startup of Beech Ridge. Of course, there are also the facts that Beech Ridge would be owned by an out-of-state corporation, and the landowners to which Beech Ridge would make lease payments are likewise out-of-state corporations.

While there are additional positive impacts claimed for the project, there are also factors that either limit or negate those claimed positive impacts. For example, there is a claimed benefit in terms of employment, but there is also the real potential for long-term injury to the state's tourism industry and to the home-sales market. There is also a claimed benefit with regard to tax payments, but the fact is that **wind-turbine facilities in West Virginia enjoy huge, extraordinary tax subsidies under the state laws governing both the property and the business and occupation taxes.**

I understand that under the statutory law governing applications such as this one, the Commission is required to give special scrutiny to "any public funding or any agreement relating to the abatement of property taxes." I also understand that the Commission does not view the property and B&O tax subsidies provided by the State of West Virginia as being subject to that provision.

Nevertheless, I submit that the existence of these subsidies is highly relevant in a case such as this. Specifically, I submit that the fact that a project would enjoy these subsidies obligates the Commission to carefully consider the project's impacts upon this state and its people, and to approve a project only if it is clearly shown that the project will not have any major negative impacts upon the state, and that overall the impacts upon the state will be significantly positive. It is the people of this state who are forgoing tax revenue under these provisions of law, and it is paramount that the Commission protect their interests in deciding whether to grant approval to any project that would partake of those subsidies.

* * *

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One other point I would like to make is that in my view, the overall course of this case demonstrates the mistake that the Commission made when it prematurely terminated the Noise Rules Task Force that it had established about a year ago. As the Commission is aware from the report it received on the Task Force's first meeting, the predominant view among the Task Force members was that (1) the siting rules should contain known, quantifiable standards for noise, and (2) the Task Force should employ outside experts to assist in developing its decisions and recommendations.

But instead of allowing the Task Force to carry out this work, the Commission, in an order of June 8th, terminated the Task Force. The reason given was that this case and the case regarding the proposed Jack Mountain project had "resulted in sufficient information regarding project noise predictions to allow the Commission to become informed and make reasonable public interest analyses in siting applications."

With the hearings in this case now complete, it now appears that on the noise issue, like on most of the environmental and economic issues, this case is essentially a "battle of the experts." Moreover, as the Commission has acknowledged in the past, by and large these are issues on which the members and staff of the Commission do not have expertise, and hence are not well suited to sort through the conflicting claims of the parties. In addition, in cases like this, the corporate applicant usually has far more resources to secure favorable testimony than the opposing citizen organizations and individuals. The Commission would be in a far better position to decide such cases if, as proposed by the Noise Rules Task Force, the rules for siting of wind-turbine facilities set out substantive environmental and other standards, and those standards that were fashioned and implemented with the assistance of genuinely independent experts.

Notwithstanding these considerations, the Commission's present obligation under the law is to decide this case on the basis of the materials that have been submitted. The burden on the Commission in cases such as this is great, because each application for a wind-turbine project that the Commission approves will not only result in a permanent and significant alteration in the face of this state, but also it will do so with heavy subsidization by West Virginia's taxpayers. I urge

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the Commission to keep these fundamental facts in mind in reaching its decision.

In accordance with Commission rules, I am, in addition to providing a copy of this letter to the Commission by telecopier, mailing the original and twelve copies to the Commission, and I am also mailing a copy of this letter to each of the parties.

Most sincerely,

A handwritten signature in black ink, appearing to read "Alan B. Mollohan", with a long horizontal flourish extending to the right.

Alan B. Mollohan



Hon. Alan B. Mollohan

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