

**PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA  
CHARLESTON**

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 22<sup>nd</sup> day of June, 2007.

CASE NO. 05-1740-E-CS

LIBERTY GAP WIND FORCE, LLC  
Wexford, Pennsylvania 15090

Application of Liberty Gap Wind Force, LLC for a Siting Certificate Authorizing the Construction and Operation of a Wholesale Electric Generating Facility and Related Transmission Support Line of less than 200 kv and Associated Interconnection Facilities in Pendleton County, West Virginia.

**PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA  
CHARLESTON**

**TABLE OF CONTENTS**

I.	PROCEDURAL HISTORY .....	4
II.	EVIDENCE .....	16
III.	DISCUSSION OF ISSUES AND EVIDENCE .....	16
A.	The Application was Deficient .....	17
1.	The 5-mile Map is Inadequate .....	17
2.	No Cultural Impact of the Project was Addressed .....	19
3.	The Viewshed Impact Evidence was Inadequate .....	21
B.	The Lack of Record Impacts The Ability to Balance the Interests ..	23
1.	Issues for Which the Record Evidence is Satisfactory .....	24
(a)	General Information about Liberty Gap .....	24
(b)	The State and Regional Need for the Project has been Shown .....	24
(c)	Substantial and Positive Economic and Work Force Impact .....	25
(d)	No Serious Risk of Impact on Wildlife, Other than Birds and Bats .....	26
(e)	No Credible Showing of an Adverse Impact of Turbines on the Value of Surrounding Property and on Tourism	26
(f)	Hydrology Evidence was Adequate .....	28

2.	Issues for Which Evidence is Lacking or Otherwise Troubling	29
(a)	Lack of Sufficient Evidence on Cultural Issues . . . . .	29
(b)	Insufficient and Conflicting Noise Evidence . . . . .	31
(c)	Government Concerns with Endangered Bat Species .	34
(d)	Failure to Satisfy its Evidentiary Burden Regarding View From Public Places . . . . .	36
C.	Based on the Record The Commission Cannot Perform the Statutory Balancing Test . . . . .	39
IV.	FUTURE APPLICATIONS AND EVIDENCE . . . . .	40
V.	FINDINGS OF FACT . . . . .	41
VI.	CONCLUSIONS OF LAW . . . . .	50
VII.	ORDER . . . . .	58

## **COMMISSION ORDER**

By this Order and for the reasons set forth herein, the Commission refuses to issue a siting certificate to Liberty Gap Wind Force, LLC (Liberty Gap) to construct a wind turbine electric generating facility (Project) in Pendleton County, West Virginia, pursuant to *W. Va. Code* § 24-2-11c and the Commission's *Rules Governing Siting Certificates for Exempt Wholesale Generators*, 150 C.S.R. 30 (*Siting Rules*). The bases of this Order, as more fully discussed below, relate to both the adequacy of Liberty Gap's Application for Siting Authority ("Application") under the *Siting Rules* and the quantity and quality of proof offered at the hearing in support of that Application under the Commission's balancing of interests test.

### **I. PROCEDURAL HISTORY**

#### **The Application**

Liberty Gap filed this Application, and supporting direct testimony, on December 7, 2005. As proposed, Liberty Gap would construct and operate the Project to generate electricity exclusively for the competitive wholesale market in West Virginia and other locations.

Liberty Gap is owned by US Wind Force, LLC, a Delaware limited liability company. Liberty Gap proposes to construct up to 50 wind turbines, each with a rated capacity of between 1,500 and 3,000 kilowatts, and certain ancillary facilities, and to construct a 138 kV transmission line to interconnect the Project to the Allegheny Power System (APS) electric transmission system. The transmission line corridor would begin at the North Franklin Substation and run south approximately 17.25 miles to the Project site. The total output of the Project would be up to 125 megawatts. The general location of the Project is spread along approximately seven miles on the Jack Mountain ridge top approximately ten miles outside of Franklin in Pendleton County, West Virginia.

Liberty Gap estimated that the total cost of the Project will be between \$175 million and \$190 million dollars and stated that there is no public finding associated with the Project.

The Application stated that Liberty Gap will be the entity solely responsible for the construction and operation of the Project and for the sale of electricity generated by the Project. Liberty Gap plans to operate the Project as an exempt wholesale generator as defined under Section 32(a) of the *Public Utility Holding Company Act of 1935*.

Liberty Gap planned to enter into an interconnection and operating agreement with PJM Interconnection, LLC (PJM) that will govern the Project's interconnection at APS's North Franklin Substation located north of the Town of Franklin, Pendleton County, West Virginia. PJM is a regional transmission organization. Liberty Gap, or the purchasers of the electricity generated by the Project, would enter into transmission service agreements with PJM to govern the transmission of the electricity across PJM's facilities. Transmission of electricity from the Project would be subject to the terms of PJM's Open Access Transmission Tariff on file with the Federal Energy Regulatory Commission (FERC). The transmission line would not compete with other utilities and would be for the sole purpose of transmitting the electricity generated at the Project onto the grid for the wholesale market.

Initial Public Notice, Comment Period and Interventions

By Notice of Filing order issued December 12, 2005, the Commission required Liberty Gap to publish notice of its filing including a 30-day protest or notice of intervention period. The required notice described the Project and explained that: (1) the Application was on file with and available for public inspection at the Commission; (2) Liberty Gap had asserted that neither the Project nor the transmission line will be utilities providing service to the public and there would be no financial impact on West Virginia ratepayers; and (3) the rates charged for electricity sold by the Project would be subject to regulation by the FERC pursuant to Section 205 of the *Federal Power Act*. Liberty Gap intended to file a market-based rate schedule with FERC that will allow sales from the Project to be at negotiated rates.

The Commission required that the notice include a map with a dotted line indicating the location of the corridor in which the transmission line would be located and designated on the map as the "Proposed Transmission Line Alignment," including alternate routes.

On December 21, 2005, the West Virginia Highlands Conservancy (Conservancy) filed a petition to intervene and requested that the public comment period be extended by 60 days. The Conservancy further requested permission to proceed as an intervenor in this case without an attorney.

On December 27, 2005, the Friends of Beautiful Pendleton County (FOBPC) and Larry V. and Rebecca K. Thomas filed petitions to intervene in this case.

On December 29, 2005, Liberty Gap filed a copy of an affidavit of publication evidencing that the Notice of Filing was published in the *Charleston Daily Mail* on December 19, and 23, 2005. On December 30, 2005, Liberty Gap filed an affidavit of publication evidencing that the Notice of Filing was also published in *The Pendleton Times* on December 22, 2005.

Numerous protests and letters of support were filed about the Application.

On December 30, 2005, Liberty Gap filed an Objection to the request of the Conservancy to proceed without an attorney.

On January 4, 2006, Commission Staff (Staff) filed an Initial Joint Staff Memorandum in this proceeding. Staff recommended that the Commission grant all pending petitions to intervene and deny the Conservancy's request to proceed without an attorney, except as to preliminary filings.

On January 6, 2006, the West Virginia Building and Construction Trades Foundation (Construction Trades) filed a petition to intervene.

On January 11, 2006, Staff filed a Further Initial Joint Staff Memorandum. Staff stated that the map included with the public notice publication was difficult to read and requested that the Commission issue an order directing Liberty Gap to republish the Notice of Filing and include a map larger in size and scope and with adequate and readable location markers.

On January 17, 2006, Liberty Gap filed a Response to Staff's Memoranda stating that it had arranged to republish the notice of filing with an improved map and urging the Commission to expedite the procedural schedule in less time than proposed by Staff.

Liberty Gap's revised Notice of Filing was published in the *Charleston Daily Mail* and *The Pendleton Times* on January 19, 2006.

On January 17, 2006, Chestnut Woods Association (Chestnut Woods) filed a petition to intervene, noting its interest in this case and requesting permission to proceed without an attorney, with leave to obtain an attorney at a later date if circumstances required.

On January 19, 2006, the FOBPC filed a petition to intervene and objected to any waiver of *Siting Rules* requirements.

By Order issued January 31, 2006, the Commission, among other things, granted the five pending petitions to intervene; denied the requests filed by the Conservancy and Chestnut Woods to participate in formal proceedings in this case without counsel; determined that the Conservancy's request for a 60-day extension of comment period was moot; denied Liberty Gap's request for expedited treatment; and adopted Staff's proposed procedural schedule. The Commission ordered the public comment hearings to be held in Pendleton County by the ALJ Division.

By Order issued February 16, 2006, the Commission rescheduled the starting time of the hearing scheduled on Wednesday, June 28, 2006 and required appropriate notice.

On May 4, 2006, the ALJ Division conducted public comment hearings in Pendleton County at 1:30 p.m. and 7:00 p.m.

On June 26, 2006, Chestnut Woods filed a motion to withdraw as an intervenor and to substitute as intervenor John Hargrove. Liberty Gap responded to Chestnut Woods' motion on June 27, 2006, and objected to the substitution of Mr. Hargrove.

By Order issued July 5, 2006, the Commission deferred ruling on Chestnut Woods' motion until Mr. Hargrove complied with *Procedural Rule 12.6.a.*, by filing a petition to intervene. On July 12, 2006, Mr. Hargrove filed a petition to intervene. By Order issued July 17, 2006, the Commission granted Mr. Hargrove's petition to intervene in order to represent his individual interests only and granted Chestnut Woods' petition to withdraw as an intervenor to this case.

Frank Young petitioned to intervene at the beginning of the evidentiary hearing on April 19, 2007. The Commission granted his motion. (Tr. I at pp. 10-19).

#### Liberty Gap's Requests for Waiver of Filing Requirements

In the Application filed on December 7, 2005, and as permitted by the *Siting Rules*, Liberty Gap requested waivers of certain of the Commission's filing requirements. Specifically, Liberty Gap requested a waiver for certain information that is required of regulated public utilities whose rates and practices impact ratepayers, including the utility service rendered, proposed rates, project construction costs, project financing and estimates of operating revenues and expenses, and other information required by *Tariff Rule 42* (e.g., statements of net income, operating revenues, depreciation, West Virginia jurisdictional rate base, plant in service and capital structure). Liberty Gap also requested a waiver of all the Commission's filing and reporting requirements, meter requirements, customer relations, inspections and tests, standards and quality of service, promotional practices, consumer reimbursement program, uniform accounting requirements, and the requirement to allow the Commission inspection of books, papers, reports and statements. Liberty Gap based its waiver requests on the assertion that Liberty Gap will not be a public utility within the meaning of *W. Va. Code* § 24-2-1.

On January 4, 2006, Staff recommended that the Commission grant Liberty Gap's request for waiver of filing requirements relating to the ratemaking implications of certificate applications for the same reasons the Commission waived those requirements in *Mt. Storm Wind Force, LLC*, Case No. 01-1664-E-CN. Staff asserted, however, that the Commission

should require Liberty Gap to provide all information related to public funding for the Project pursuant to the Supreme Court's holding in *Affiliated Construction Trades Foundation v. Public Service Commission of West Virginia*, 211 W. Va. 315, 565 S.E.2d 778 (2002); *W. Va. Code* § 24-2-11c, and *Siting Rule* 3.1.1.

On January 31, 2006, the Commission granted Liberty Gap's request for a waiver of *Tariff Rule* 42 filing requirements, but deferred ruling on Liberty Gap's request for waivers of certain other *Siting Rules* requirements.

By filing on February 24, 2006, Liberty Gap indicated that it would submit noise studies described in *Siting Rule* 3.1.m.4. and represented that those studies would be submitted no later than May 1, 2006.

By Order issued April 12, 2006, the Commission granted Liberty Gap's request to waive the requirement to provide information related to fuel quantity, quality, storage and transportation found in *Siting Rule* 3.1.c.; granted Liberty Gap's request to waive the requirement to provide information pursuant to *Siting Rule* 3.1.c. relating to air and water emissions; granted Liberty Gap's request to waive the requirement of *Siting Rule* 3.1.g.2. to provide an aerial photograph for a one-mile radius from the generating project that is less than one year old; granted Liberty Gap's request to waive the requirement to provide a map showing fuel and waste facilities and water supply and sewage supply under *Siting Rule* 3.1.h; granted Liberty Gap's request to waive the requirement to provide a still rendering depicting structures at ground level and scaling a six-foot tall figure in near proximity to the structures on condition that Liberty Gap refile relevant photos with the wind turbines darkened to show up more clearly against the background/horizon; denied Liberty Gap's request to waive the requirement to provide a generating project pre-construction map having at least a one-mile radius from the Project showing topographic contours, existing vegetation cover, individual structures and installations, surface bodies of water, and water, gas, and oil wells; granted Liberty Gap's request to waive the requirement of *Siting Rule* 3.1.k.1. to provide a natural and man-affected water budget for this Project; and denied in part Liberty Gap's request to waive the requirement to provide a map of aquifers that may be directly affected by the Project under *Siting Rule* 3.1.k.3. In satisfaction of this rule, the Commission required Liberty Gap to directly verify that the construction and installation of the wind turbine project will not impact surface water bodies or sub-surface water sources, to indicate the reasons that there will be no impact, and to represent that Liberty Gap will fix any problems that occur as a result of the Project relating to this issue. The Commission also denied Liberty Gap's request to waive the requirement to provide *pro forma* financial statements pursuant to *Siting Rule* 3.1.l. and denied a FOBPC request that the Commission order Staff to commit technical personnel to review, verify and comment on all technical filings of Liberty Gap and direct Staff to employ or retain consultants and other experts to perform reviews and comment on technical filings in areas where Staff lacked expertise.



### FOBPC's First Motion To Dismiss

On January 31, 2006, FOBPC filed a Request for Leave to File Motion to Dismiss and a Motion to Dismiss Liberty Gap's Application. FOBPC asserted that Liberty Gap had failed to comply with the minimum requirements for disclosure required by the *Siting Rules* and had failed to provide proper notice of its Application. FOBPC argued that the Application should be dismissed and Liberty Gap should refile in order to start a new statutory clock and allow interested parties the full statutory period for involvement in the case.

FOBPC argued that Liberty Gap failed to comply with *Siting Rule* 3.1.g.1.A. which required Liberty Gap to disclose the criteria, and the weighting of that criteria, in its site selection. FOBPC noted that Liberty Gap also did not comply with *Siting Rule* 3.1.g.2. because it filed an outdated aerial photograph. FOBPC stated that Liberty Gap also failed to comply with *Siting Rule* 3.1.h.2.E. requiring identification on a one-mile radius pre-construction map of all water wells within a one-mile radius of the Project. FOBPC stated that Liberty Gap failed to file noise studies under *Siting Rules* 3.1.m.4.A, 3.1.m.4.B. and 3.1.m.4.C. FOBPC also noted that Liberty Gap had not complied with *Siting Rule* 3.1.o.1.A requiring an estimate on the impact of the Project on "the preservation and continuing meaningfulness of any historic, scenic, religious, or archaeological areas or places."

On February 9, 2006, Liberty Gap filed a response to FOBPC's Motion to Dismiss.

On February 15, 2006, Commission Staff filed a Third Further Initial Joint Staff Memorandum responding to FOBPC's Motion to Dismiss. Staff stated that Liberty Gap's republication of the notice, with a better map, addressed Staff's concerns about the public notice. Staff also argued that it would be premature for the Commission to rule on the motion to dismiss before ruling on Liberty Gap's waiver requests. (See recitation of filings relating to waiver request, *supra*).

On February 24, 2006, FOBPC filed a Request to Defer Action on Motion to Dismiss pending FOBPC's further review of the entire Application and the Commission's *Siting Rules*.

On March 22, 2006, FOBPC filed a Further Memorandum in Support of its Motion to Dismiss. Liberty Gap responded to this filing on April 3, 2006.

On April 12, 2006, the Commission ruled on Liberty Gap's waiver requests and permitted FOBPC to renew its motion to dismiss after receipt of Liberty Gap's filings required by the same order. In any renewed motion to dismiss, the Commission ordered FOBPC to indicate the time it would need to review the data prior to filing pre-filed testimony.

Procedural Background Regarding Site Access, Dismissal, and Reinstatement of Case

On June 16, 2006, FOBPC filed a motion to allow its consultants access to the project area to conduct a hydrology/geology study. FOBPC stated that Liberty Gap had refused its earlier request. On June 19, 2006, Liberty Gap filed a response indicating that Allegheny Wood Products, Inc. owns the Project site and that Allegheny Wood Products had concerns about liability, lease violation, and cost regarding access to the site by FOBPC. FOBPC filed replies to Liberty Gap on June 21, 2006 and June 23, 2006. FOBPC again requested immediate access to the Project site for FOBPC's representatives and consultants to conduct geological and hydrological studies, with initial access being to inspect, photograph and perform limited surface sampling.

On June 23, 2006, Commission Staff supported FOBPC's right to conduct a field visit at the site of the Project as part of the discovery process and asserted that Liberty Gap had caused unnecessary delay. The Commission, on June 23, 2006, required Liberty Gap to accord FOBPC access to the site on essentially the same terms as were in place when Staff was provided access to the site. The Commission stated that it was not opposed to a reasonable waiver of liability if Liberty Gap requested one.

On July 3, 2006, FOBPC filed a motion for evidentiary sanctions on Liberty Gap for its refusal to cooperate with FOBPC's request for access and for obstruction of access with unreasonable conditions. Liberty Gap responded to that motion July 5, 2006.

On July 24, 2006, the Commission held that the Application should be dismissed without prejudice because Liberty Gap had submitted a patently unreasonable draft release to FOBPC, effectively denying FOBPC the opportunity to access the project area, and thereby effectively eliminating the possibility of meaningful litigation of the issues in this case. The Commission noted that Liberty Gap would be allowed to refile its Application but must cooperate with the parties on property access and other discovery matters.

On July 31, 2006, Liberty Gap filed a petition for reconsideration of the Commission's July 24, 2006 Order. Liberty Gap argued that the Commission misunderstood Liberty Gap's rationale for denying access to FOBPC experts and indicated that it was willing to toll the statutory deadline and pay the travel costs of FOBPC's consultants to return to the project site.

On September 1, 2006, the Commission reinstated this proceeding on certain conditions, including Liberty Gap's consent to toll the statutory decision due date until June 22, 2007, and set forth a revised procedural schedule, including a hearing commencing on Tuesday, December 12, 2006, following appropriate notice.

On September 25, 2006, Liberty Gap filed a Response to the Commission's September 1, 2006 Order and represented that it had complied with the conditions of that Order.

Miscellaneous Filings

On March 10, 2006, the United States Department of the Interior, Fish and Wildlife Service (USFWS), filed a letter containing comments on a "Species Request for Liberty Gap Wind Power Project."

On March 31, 2006, Staff filed a motion to compel Liberty Gap to respond to certain data requests. The Commission granted this motion in its April 12, 2006 Order.

On April 13, 2006, Liberty Gap filed a motion to Recaption the Proceeding (to exclude the words "certificate of convenience and necessity" from the case caption) and Revision to Notice of Hearing.

On April 17, 2006, Liberty Gap requested that the Commission modify the April 12, 2006 Order to allow Liberty Gap to map water wells within only one-half mile of turbine sites, and 1,000 feet of the transmission line path, instead of within a one- mile radius of all facilities under *Siting Rule* 3.1.h.2.E.

On April 19, 2006, Liberty Gap filed its Analysis of Effects to Federally Endangered Bats at the Proposed Liberty Gap Wind Energy Generation Project, Pendleton County, West Virginia, with Post-Construction Monitoring and Adaptive Management Plan and Conservation Approaches to Address Concerns for Bats. This analysis was prepared for Liberty Gap by BHE Environmental, Inc., Cincinnati, Ohio.

On April 24, 2006, Liberty Gap filed a Motion for Nondisclosure and Protective Order as to its *pro forma* financial information and its power purchase agreement<sup>1</sup> and on April 24, 2006, filed its responses in compliance with the Commission's April 12, 2006 Order.

On May 23, 2006, FOBPC filed a Motion for an extension of time to file direct and rebuttal testimony. Staff filed a Response on May 24, 2006, agreeing that FOBPC should have additional time to review the Application, data and testimony, and stating that Liberty Gap should request the Commission to toll the statutory decision due date. Staff argued that if Liberty Gap did not agree to toll, the Commission should dismiss the Application for failure to timely file a complete Application. On May 24, 2006, Liberty Gap indicated that it was willing to toll the statutory period for 45 days.

---

<sup>1</sup>Liberty Gap amended this motion by filing on May 22, 2006.

On May 31, 2006, the Commission granted Liberty Gap's April 13, 2006 Motion to Recaption the Proceeding and Revision to Notice of Hearing; granted the Motion for Leave to File Additional and Supplemental Direct Testimony of James Barnes and Karen Tyrell, Ph.D.; denied the April 17, 2006 Motion to Modify April 12, 2006 Order to require Liberty Gap's filing responsive to *Siting Rule 3.1.h.2.E.* to map water wells within only one-half mile of turbine sites, and 1,000 feet of the transmission line path, instead of within a one-mile radius of all facilities; ordered Liberty Gap to file the one-mile radius mapping of water sources as required by *Siting Rule 3.1.h.2.E.*, within ten days; ordered that, with the exception of the one-mile radius mapping of water well information, Liberty Gap was not to file any further direct testimony or evidence in support of its Application; granted Liberty Gap's April 24, 2006 Motion for Nondisclosure and Protective Order, as amended; denied Liberty Gap's request that the Commission determine that the subject information will not be subject to disclosure under the Freedom of Information Act; granted FOBPC's May 23, 2006 motion for an extension of time to file direct and rebuttal testimony; granted Liberty Gap's May 24, 2006 Motion to toll Statutory Decision Date, establishing a new statutory decision due date of November 17, 2006; and adopted a new procedural schedule and publication requirements. A subsequent Order entered September 1, 2006 tolled the statutory decision due date until March 16, 2007, and a subsequent Order entered December 14, 2006, tolled the statutory decision due date until June 22, 2007.

On October 2, 2006, the USFWS filed a copy of a letter from USFWS to counsel to Liberty Gap encouraging Liberty Gap to pursue a permit pursuant to section 10 of the Endangered Species Act. Liberty Gap had previously informed the USFWS that it would not pursue a "takings" permit. The USFWS urged Liberty Gap to pursue the permit in view of the dismissal of the case and the likelihood of delay of the project schedule.

#### Pre-filed Testimony

Liberty Gap filed its direct testimony with the Application on December 7, 2005.

On April 17, 2006, Liberty Gap filed a Motion for Leave to File Additional and Supplemental Direct Testimony and Motion to Modify April 12, 2006 Order. Liberty Gap asked that it be permitted to file testimony to accompany its noise study to be submitted on May 1, 2006, as well as file testimony to support and explain the results of a second supplemental endangered bat study to be submitted on or after April 21, 2006, in response to *Siting Rule 3.1.m.2.A.2.*

On May 5, 2006, Liberty Gap filed the testimony of James Barnes supporting the acoustical study filed by Liberty Gap on April 24, 2006, and the testimony of Karen Tyrell, Ph.D., supporting the endangered bat study submitted in response to discovery filed by Staff.

On July 17, 2006, FOBPC filed the direct and rebuttal testimony of several witnesses. On the same date, intervenors Garnett Gregory, Larry V. Thomas and Rebecca K. Thomas, and John Hargrove filed their pre-filed testimony.

On November 14, 2006, FOBPC and Mr. Hargrove filed supplemental direct and rebuttal testimony.

On November 29, 2006, Staff filed the separate pre-filed direct and rebuttal testimonies of Wayne M. Perdue and Dixie L. Kellmeyer.

On December 6, 2006, Liberty Gap filed a motion to substitute James M. Cookman as a witness at hearing in place of G. Thomas Matthews. Mr. Cookman, Vice-President of Project Development for Liberty Gap, would adopt the testimonies of G. Thomas Matthews as his own.

Also on December 6, 2006, Liberty Gap filed rebuttal testimony of 14 witnesses.

On April 16, 2007, Liberty Gap filed a motion to strike pre-filed testimonies of citizen witnesses filed by FOBPC on grounds that the testimony was in the nature of public comment. The Commission denied this motion at the beginning of the hearing held on April 19, 2007, but cautioned that, given the nature and content of much of that testimony, it might be given little evidentiary weight by the Commission.

#### Continuance of December 12, 2006 Hearing

On December 11, 2006, Liberty Gap filed a motion to continue the hearing scheduled to begin the next day. Liberty Gap stated that it had failed to comply with the Commission's publication requirement in the September 1, 2006 Order. Noting the Commission's statutory deadline in this case, Liberty Gap also moved the Commission to extend the statutory deadline by 30 days. Alternatively, Liberty Gap argued that the hearing could proceed if the Commission held that a recent *Pendleton Times* news article regarding the scheduled hearing provided adequate notice to readers.

By Order issued December 11, 2006, the Commission denied Liberty Gap's motion to continue the hearing for 30 days and to toll the statutory decision due date. The Commission ordered that the hearing commence the next day for the purposes of taking public comment and hearing argument from the parties regarding the appropriate disposition of this case. The Commission continued the evidentiary portion of the hearing generally.

The hearing convened as scheduled on December 12, 2006, for public comment and other limited purposes.

By Order issued December 14, 2006, the Commission memorialized bench rulings at the December 12, 2006 hearing and continued the hearing to April 16, 2007;<sup>2</sup> ordered that no additional petitions to intervene would be granted; tolled the statutory decision due date to June 22, 2007; required Liberty Gap to make bi-monthly status report filings on the progress of its voluntary Habitat Conservation Plan (HCP) process and its application for an Incidental Take Permit (ITP) for the Project with the USFWS; and required Liberty Gap to publish notice of the rescheduled evidentiary hearing.

*Pre-hearing Wildlife Motion*

On December 8, 2006, Liberty Gap filed a motion requesting that the Commission abstain from considering the potential impact to wildlife, including bats, of the Project. The motion asserted that wildlife concerns would be addressed pursuant to the commitment of Liberty Gap to commence a voluntary HCP process and apply for an ITP for the Project with the USFWS. Liberty Gap offered to stipulate to a condition of its siting certificate to address alleged impacts of the Project to wildlife. On December 8, 2006, Staff filed a response to that motion recommending that the Commission deny the motion. On December 12, 2006, FOBPC also filed a response opposing Liberty Gap's motion to abstain from hearing wildlife impact evidence. On December 18, 2006, Liberty Gap replied to both FOBPC and Staff on this issue.

On December 11, 2006, Michael A. Soukup, Ph.D., Associate Director, Natural Resource Stewardship and Science, USFWS, filed a letter to the Public Service Commission expressing the USFWS's concerns regarding project impacts on endangered bat species.

On March 20, 2007, Staff filed a copy of a December 8, 2006, USFWS letter to Staff counsel, attaching authenticated copies of correspondence between USFWS and Liberty Gap.

By Commission Order issued April 6, 2007, the Commission granted Liberty Gap's motion to abstain from hearing wildlife impact evidence with respect to the Indiana Bat and the Virginia Big-Eared Bat; required Liberty Gap to notify the Commission in writing within ten days of any species in addition to the Indiana Bat and the Virginia Big-Eared bat that Liberty Gap would include in both its Environmental Assessment (EA) and its HCP; and denied Liberty Gap's motion to abstain from hearing wildlife impact evidence as to species other than the Indiana Bat, the Virginia Big-Eared bat, and those species to be included in Liberty Gap's EA and HCP.

---

<sup>2</sup>The hearing date was changed to April 19, 2007 by Commission Order issued March 13, 2007.

On April 13, 2007, Liberty Gap filed a notice stating that in addition to the Indiana Bat and Virginia Big-Eared Bat, it would include threatened bald eagles, non-listed bats, and migratory birds in its HCP and/or EA.

On April 16, 2007, FOBPC filed a petition to consider the impact on all wildlife species pursuant to the Commission's public interest review of the siting certificate Application and request for expedited consideration. The Commission granted FOBPC's motion at the beginning of the April 19, 2007 hearing and reversed its April 6, 2007 Order.

#### Pre-hearing Motions for Protective Treatment

On December 6, 2006, Liberty Gap filed a motion for protective treatment of the confidential version of Liberty Gap witness James Cookman's rebuttal testimony filed that same day.

On December 11, 2006, FOBPC filed a motion for protective treatment of documents produced by FOBPC in response to Liberty Gap's Second Discovery Requests. The requested documents are "Unpublished Reports and Maps by A.H. Fleming" for the members of Chestnut Woods Association, LLC. Specifically, the documents are (1) 1995 - Geological Map of Chestnut Woods and Vicinity, Pendleton County, West Virginia, and (2) a document entitled, "1988 Ground Water Primer for Chestnut Woods Partners, Pendleton County, West Virginia." Both documents were prepared by FOBPC's hydrology expert, Anthony H. Fleming.

The Commission's April 6, 2007 Order granted both of the foregoing motions.

On April 11, 2007, Staff filed a pleading to notify the Commission that it believed the protected portion of Mr. Cookman's testimony was overly broad and that Staff would make such an objection at the time Liberty Gap moved that testimony into evidence at hearing. At the hearing, the parties agreed that only two exhibits to Mr. Cookman's testimony should be treated as confidential. Accordingly, there was no need for testimony itself to be protected, only Liberty Gap's *pro forma* financial statement and its power purchase agreement. (Tr. I at p. 49).

#### Monthly HCP/ITP Status Reports

Liberty Gap filed its first bi-monthly HCP/ITP progress status report, pursuant to the Commission's December 14, 2006 Order, on January 16, 2007; the second on March 15, 2007; and the third on May 15, 2007.

### Briefing

The Commission has reviewed the post-hearing briefs filed by Liberty Gap, Staff, FOBPC, John Hargrove, Larry & Rebecca Thomas, Construction Trades and Frank Young.

### Evidentiary Hearing

The hearing convened as scheduled on April 19, 2007. Liberty Gap had previously filed affidavits of publication evidencing proper public notice of the hearing date.<sup>3</sup>

## **II. EVIDENCE**

The evidence reviewed and considered by the Commission in this proceeding is voluminous. At the moment, the record in this case, amassed over 17 months of procedural and substantive “warfare,” consists of eight transcripts of protest hearings and evidentiary hearings (all of which total nearly 1,370 pages), 70-plus pre-filed direct, rebuttal, and other testimonies and exhibits of nearly 35 witnesses who appeared at those hearings, approximately 30 studies, reports or other efforts of numerous experts and others interested in particular issues in the proceedings and untold pleadings and filings described above. The Commission will not summarize all of that testimony and evidence in the body of this Order. For ease of reference to the evidence on various issues addressed in the proceeding, the Commission believes that the evidentiary summary attached to Staff’s May 16, 2007 Initial Brief at Tab A found on the Commission’s website at:

[http://intranet.psc.state.wv.us/imaged\\_files/Docket/2007\\_05/dck20070516161018.pdf](http://intranet.psc.state.wv.us/imaged_files/Docket/2007_05/dck20070516161018.pdf)

is reasonably accurate, although the Commission does not necessarily agree with the Staff characterizations of and conclusions drawn from that discussion of the evidence.

## **III. DISCUSSION OF ISSUES AND EVIDENCE**

As can be seen by the lengthy procedural discussion, this case has been marked by fits and starts with respect to the nature and content of the Application and the development of the evidence, and by vigorous (and sometimes rancorous) disputes among the parties as to the timing and requirements for satisfying the *Siting Rules*.

---

<sup>3</sup> On April 9, 2007, Liberty Gap filed an affidavit of publication evidencing publication of the notice of hearing on April 6, 2007, in both *The Charleston Gazette* and the *Charleston Daily Mail*, and on April 13, 2007, Liberty Gap filed an affidavit evidencing publication of the required notice of hearing in Pendleton County in *The Pendleton Times* on April 5, 2007.



While there is room for argument about the nature, quality and adequacy of the testimony offered at the hearing, the Commission believes that, based on the testimony and exhibits discussed in this Order, there is adequate evidence in the record to support Liberty Gap's Application on the issues of the general information about Liberty Gap and the Project; the State and regional need for the Project; the economic and work force impact of the Project; the impact on wildlife, other than birds and bats; the impact on property values and tourism; and the impact on hydrology.

Notwithstanding the evidence on these issues, based on a review of the extensive record in this case, the Commission must conclude to refuse to grant the Application. The grounds for our refusal are, despite the lengthy and substantial efforts over 17 months to amend, supplement and otherwise modify the initially deficient Application, Liberty Gap has still failed to (i) file a materially complete Application pursuant to the Commission's *Siting Rules* or (ii) satisfy its evidentiary burden on several key issues that the Commission must analyze and balance under the statutory requirements of *W. Va. Code* § 24-2-11c and the Commission's *Siting Rules*.

#### **A. The Application Was Deficient**

##### **1. The 5-mile Map is Inadequate**

In its Application filed on December 7, 2005, Liberty Gap virtually ignored the requirements of *Siting Rule* 3.1 regarding the initial 5-mile map. Rule 3.1 of the *Siting Rules* requires Liberty Gap to file a 5-mile radius map (the 5-mile map) and lists certain items to be included on the initial 5-mile map filed with the Application.

Specifically, *Siting Rule* 3.1.h.1 provides:

Maps. The applicant shall file the following maps with its application.

1. 5-mile radius Map. The applicant shall supply an ANSI size D map(s) of 1 inch: 4800 feet scale or larger containing at least a 5-mile radius from, and depicting, the proposed 24-2-1(c) generating facility and transmission lines, and showing the following features:
  - 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;
- G. Land use and classifications; including residential, urban, manufacturing, commercial, mining, transportation, utilities, wetland, forest and woodland, pasture and crop land[.]

The 5-mile map is core to the information for the Commission and others about the structures, entities, population centers and public and private assets that will or might be affected by the Project. Liberty Gap's 5-mile application map was inadequate.

Liberty Gap also filed direct testimony simultaneously with its Application, but that testimony did not provide further elaboration of matters to be presented on the 5-mile map. Consequently, not only was the Application map inadequate, Liberty Gap's pre-filed direct testimony was inadequate regarding matters covered by the map. Other than providing a map showing the boundaries of National Forests and wildlife management areas, the 5-mile map did not designate existing land uses; public or private recreation hunting, fishing or similar areas; and parks, historic areas or places, or archaeological places--all as required by Rule 3.1. Liberty Gap eventually presented a revised 5-mile radius map (L.G. Exhibit No. 17, Exhibit WL 4) with its rebuttal testimony, but that map was not provided until 12 months after the filing of the Application and was provided in an attempt to cure the failings of the 5-mile map filed with the Application. The provision of the map with rebuttal testimony did not meet the requirements of *Siting Rule* 3.1 nor did it provide other parties with a fair opportunity to review the issues raised by the required 5-mile map.

This is not a situation where a few incidental items were overlooked in preparing the map. That might be understandable. This particular map and the process used to develop it were fundamentally flawed, and the 5-mile map falls significantly short of meeting the requirements of the *Siting Rules*. Furthermore, Liberty Gap's pre-filed direct testimony provides no further insight into matters intended to be illustrated on the map. As a consequence, Liberty Gap did not timely provide the public with a complete Application to review in order to understand the nature of the Project and its impact on the community.

The 5-mile map is not a minor part of the filing; it is central to any understanding of the scope of the Project at the outset of the review of the Application. The Commission

adopted Rule 3.1.h.1 and requires pre-filed testimony in order to minimize discovery disputes and to facilitate the development of a record consistent with the procedural rights of other parties. Further, although the FOBPC provided a more detailed map at the hearing, it did so with an express reservation that it was not attempting to provide the map to fulfill Liberty Gap's requirement, but rather to demonstrate the inadequacy of the Liberty Gap 5-mile map. The Commission agrees with FOBPC and will not rely on the map provided by FOBPC as support for Liberty Gap's 5-mile map.

The inadequacy of the 5-mile map was clear from Liberty Gap's sponsoring witness at the hearing, Mr. Llewellyn, who acknowledged that he downloaded a base map from the West Virginia GIS Technical Center web page and then used that map to create the 5-mile Application map. (Tr. I at p. 183, L.G., Exhibit No. 10, tab 13). Mr. Llewellyn, however, conceded that he did not know the date the base map was made, nor did he know the date of any revision. (Tr. I at p. 183). He also could not verify whether the downloaded base map accurately reflected land use, recreational areas, forest areas, etc. (Tr. I at p. 184). Mr. Llewellyn acknowledged that when preparing the original 5-mile map he did not visit the area where the Project would be located to see what land use and cultural and historical features might be missing from the base map. (Tr. I at pp. 184-85).

The Commission takes seriously the filing requirements of its *Siting Rules*, and the filing of a basic United States Geological Survey map, without the provision of the required additional features and information required by the *Siting Rules*, is materially inadequate compliance with *Siting Rule* 3.1.h.1.

## **2. No Cultural Impact of the Project was Addressed**

*Siting Rule* 3.1.o. provides,

Cultural impact.

### **1. Landmarks.**

- A. The applicant shall estimate the impact of the proposed [Project] 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 5-mile application map].
- B. Describe any plans to mitigate adverse impacts on these landmarks.

2. Recreation areas. The applicant shall estimate the impact of the proposed [Project] on recreational areas identified on the [5-mile application map] and describe plans to mitigate any adverse impact.

Liberty Gap failed to comply with *Siting Rule* 3.1.o. Other than noting the location of churches, Liberty Gap did not provide any information regarding the cultural impact of the Project or any potential impacts on any cultural resources located within a 5-mile radius of the Project.

In lieu of complying with *Siting Rule* 3.1.o., Liberty Gap stated in the Application only that it believed the Project would have no impact on historical or archaeological resources within Pendleton County. ( L.G. Exhibit No. 10. at p. 120). That conclusory statement, without more, falls far short of the requirement of *Siting Rule* 3.1.o. Liberty Gap further stated that it had contacted the West Virginia State Historical Preservation Office (SHPO) and had contracted with Cultural Resource Analysts, Inc. (CRAI) to complete an archaeological survey. (*Id.*) The record reflects, however, that the arrangements with CRAI were not made until December 2006, and that CRAI only recently contacted SHPO. (Tr. I at pp. 103-04, 106; Tr. II at pp. 56-57). Liberty Gap's unsupported assertion in the Application that the Project would have no impact on historical or archaeological resources may be correct, but the Commission's *Siting Rules* require more. By failing to provide anything in the Application or in the pre-filed testimony, (or at the hearing for that matter) about the cultural impact of the Project, Liberty Gap has submitted an inadequate Application.

Liberty Gap suggests that the deficiency in the Application may be cured by its promise to file the archaeological survey and by compliance with subsequent recommendation made by the West Virginia Division of Culture and History.<sup>4</sup> Unfortunately, Liberty Gap's suggested cure manifests the patent absence of information in its Application and ignores the fact that the information was not included in pre-filed testimony or otherwise developed at hearing. Liberty Gap failed to provide minimal information on an issue that should have been addressed at the outset of this case and has not provided the public with sufficient information to review and understand the nature of the Project and its potential impact on the community around Jack Mountain.

---

<sup>4</sup>The Commission understands that following the issuance of a siting certificate micrositing of turbines and the commencement of earth moving, the Division of Culture and History and the Applicant have a continuing role to assess archaeological as well as cultural and historical impacts.

### 3. The Viewshed Impact Evidence was Inadequate

*Siting Rule* 3.1.j.1. provides,

1. The applicant shall provide still renderings from all scenic overlooks and project views that will be most evident to the public, and which are accessible to the applicant, from which the 24-2-1(c) generating facility will be visible after construction.

West Virginia has become a popular location for the proposed installation of wind turbine projects. Unfortunately, unlike in some other areas in this country and other countries where wind projects can be placed in obscure and not particularly visible or attractive locations, the windswept tops of this State's highest ridges provide the only reasonably good and reliable source for wind to power turbines to produce electricity in this State.

At the same time, because these wind turbines are extremely large, are generally constructed in arrays, and are located on our mountain tops within the State, they tend to be highly visible, even when planned for relatively remote and unpopulated areas of the State. As a consequence, the likely visibility of these projects (and the strong feelings and emotions this generates among the proponents and opponents of these projects) was a primary concern of the Commission in promulgating the *Siting Rules*. In fact, *Siting Rule* Rule 3.1.j.1 was promulgated with that very concern in mind.

Obviously, the requirement of Rule 3.1.j.1 can be construed strictly or broadly, and the number and extent of possible "project views" of any wind project of this magnitude (there are approximately 50 wind turbines ranging in height from 330 to 426 feet spread along approximately seven miles of the top of Jack Mountain) can vary. Having said that, the Commission believes that Liberty Gap should have been more attuned to this concern and that it failed to comply with *Siting Rule* 3.1.j.1.

Liberty Gap filed only six renderings of the Project in the Application – those were from Reddish Knob, the Spruce Knob Observation Tower, and four other views from sites near the Project site (L.G. Exhibit No. 25). The Commission understands that the Application cannot reflect every conceivable angle or view from every site that might provide a view of the Project, but the Commission *Rule* requires still renderings from scenic overlooks and project views evident to the public.

The Commission's decision in *NedPower Mount Storm, LLC*, Case No. 02-1189-E-CN placed wind project applicants on notice of the level of interest and concern the Commission accords views from public access points. In *NedPower*, the Commission

withheld certification to NedPower to build the Southern Phase of that Project because of the proximity of that phase to the Dolly Sods Wilderness Area. The Commission withheld granting a certificate for the Southern Phase unless NedPower could demonstrate that the 200 turbines in the Southern Phase could not be relocated into the Central and Northern Phases and that this inability would cause the Project to become financially unfeasible. (*NedPower Mount Storm, LLC*, Case No. 02-1189-E-CN, Commission order entered April 2, 2003, Finding of Fact no. 237 at p. 99, and Conclusion of Law no. 12 at p. 102). Liberty Gap did not acknowledge or provide in its Application renderings of how the Project will look from the following public scenic overlooks: Entrenchment Overlook on U.S. 250, Shenandoah Mountain; High Knob Tower; the Confederate Prayer Service Site on U.S. 220; and the Shenandoah Mountain Overlook, U.S. 33. (See L.G. Exhibit No. 25; FOBPC Exhibit No. 76). Furthermore, Liberty Gap did not make an effort to determine the number of turbines that might be seen from certain sites because Liberty Gap did not believe it mattered whether one could see one or six turbines. (Mr. Llewellyn's testimony; Tr. I at p. 190). While there may be some dispute about whether these locations are "scenic overlooks" and project views that will be most evident to the public and which are accessible to the Applicant, the Commission believes they should have been considered in the Application (particularly in light of the relatively few "views" selected by the Applicant of the Project).

The Entrenchment Overlook on U.S. 250, Shenandoah Mountain is a National Forest Service site and is part of the George Washington-Jefferson National Forest. (McNeely testimony, FOBPC Exhibit No. 76, P.3). This site is also the southern trailhead for the National Forest Service Shenandoah Mountain Trail. (McNeely testimony, FOBPC Exhibit No. 76, P.3).

The High Knob Tower is a historic former fire tower of solid wood construction owned by the National Forest Service as part of the George Washington-Jefferson National Forest. (McNeely testimony, FOBPC Exhibit No. 76, P. 4).

The Shenandoah Mountain Trail and High Knob Trail are National Forest Service Trails on the west side of the Shenandoah Mountain that would have a view of the project. (McNeely testimony, FOBPC Exhibit No. 76, P. 4).

The Confederate Prayer Service Site on U.S. 220 is a historic site south of Franklin and six to eight miles from the project site. (McNeely testimony, FOBPC Exhibit no. 76, P. 14).

The Shenandoah Mountain Overlook, U.S. 33 is a viewpoint from a West Virginia Department of Highway developed parking lot and overlook on top of Shenandoah Mountain and 13 to 18 miles away from the proposed turbines and the northern trailhead for the National Forest Service's Shenandoah Mountain Trail, which is part of the George Washington-Jefferson National Forest. (McNeely testimony, FOBPC Exhibit No. 76, P. 17).

At this stage, the Commission is not making a qualitative assessment of the impact or nature of these views on the public, nor is the Commission holding that any view of a wind turbine from any public site makes that site, *per se*, inappropriate for a wind power project. The Commission will make the decision of public view impact on a case-by-case basis. Rather, we are attempting to assess the adequacy of the filing and whether the failure to consider or include renderings from these sites or others leads the Commission to conclude that the Application, as well as its pre-filed direct testimony, failed to adequately inform the Commission and the public of the impact on views that will be most evident to the public and that are accessible to Liberty Gap. We believe that is the case.

**B. The Lack of Record Impacts the Ability to Balance the Interests**

In view of the deficiencies in the initial Application and pre-filed direct testimony and the Commission's concern with the quality of that Application under the *Siting Rules*, the Commission could choose to end its analysis of this case at this point and refuse to grant the Application solely for the reason that the Application is inadequate. However, having presided over five days of hearing and reviewed more than 70 exhibits, and 14 post-hearing briefs, the Commission is moved to note that, even after the attempts Liberty Gap made to strengthen its case following other parties' motions to dismiss filed early on in this proceeding, Liberty Gap did not meet its burden of proof on cultural issues. Nor does the Commission believe that Liberty Gap carried its burden of proof with respect to evidence about possible noise impact and intrusion from the Project. The lack of adequate evidence on the significant issues of noise and cultural impact (coupled with our continuing concern about endangered bat species discussed below) eliminates the Commission's ability to "balance the interests" in this case pursuant to *W. Va. Code* § 24-2-11c.

Although the Commission is also disturbed by the apparently directly conflicting evidence about the potential impact of the Project on endangered species of bats, it believes that Liberty Gap has met the burden of the preponderance of the evidence. Nevertheless, the Commission is very concerned about the position of the USFWS and WVDNR on this issue and the fact that the record does not contain a resolution of the issue of the possible impact

of the Project on endangered bat species and, in particular, the unsettled state of the HCP and ITP process. See discussion below beginning at p. 34.

# **1. Issues for Which the Record Evidence Is Satisfactory**

Before addressing the areas in which the evidence was not adequate, the Commission should note the specific issues for which the Commission believes that the preponderance of the evidence supports Liberty Gap:

## **(a) General Information about Liberty Gap**

Liberty Gap has adequately demonstrated its interest in developing the proposed Project. As of the date of the evidentiary hearing, Liberty Gap estimated that it had spent over \$2,500,000 on the Project. (L.G. Exhibit No. 14 at p. 32). Additionally, Liberty Gap has entered into a power purchase agreement, which identifies a purchaser for the power generated by Liberty Gap at a guaranteed price. (L.G. Exhibit No. 14 at p. 32-34).

## **(b) The State and Regional Need for the Project has been Shown**

Liberty Gap has demonstrated a need for the project. While Liberty Gap does not assert that the Project would address a need for additional generation capacity to serve customers within West Virginia, it has presented evidence that the East Central Area Reliability Region (ECAR) has a need for additional generation. (Mr. Matthews' testimony, L.G. Exhibit No. 1 at pp. 4-6). Thus, power from this project could meet needs throughout the region. In prior EWG cases, the Commission has relied on ECAR reports of electric generation needs to support findings of regional need. (*See Longview Power, LLC*, Case No. 03-1860-E-CS, August 27, 2004, Order, p. 60; *Nedpower Mount Storm LLC*, Case No. 02-1189-E-CN, April 2, 2003 Order, p. 60; *Backbone Mountain Windpower, LLC*, Case No. 00-1209-E-CN, December 29, 2000 Order, p. 25; *Panda Culloden Power, L.P.*, Case No. 00-1702-E-CN, June 27, 2001 Order, pp. 10-11; *Marshall Power, LLC*, Case No. 01-0030-E-CN, January 31, 2002 Order, p. 12). Liberty Gap pointed out that older generators require installation of environmental controls and that approximately 91% of existing generating capacity in the ECAR region is fired by fossil fuels. (Mr. Matthews' testimony, L.G. Exhibit No. 1 at pp. 4-6). Liberty Gap would offer an emissions-free alternative form of energy and the Project would produce enough electricity to serve over 35,000 electric customers. (*Id.* at p. 4-8).

FOBPC witnesses argued that wind turbine farms do not reduce greenhouse gases because a need for reliable back-up power remains to address peak demand (*see, e.g.*, Dr. Dodds' testimony, FOBPC Exhibit No. 82), and that wind energy is only about 30% efficient. (*See e.g.*, Ms. Volentine's testimony, FOBPC Exhibit No. 49). Regardless of the



possible problem with wind turbines addressing peak demand, wind generation delivers power to the electric grid which can serve to displace generation that emits greenhouse gases. Furthermore, the *Energy Policy Act of 2005* (EPA 2005), P.L. 109-58, amended certain sections of the *United States Code* to encourage the use and development of renewable energy resources. (See Title II of P.L. 109-58).

The Commission's policy is consistent with EPA 2005 and promotes utility access to diversified energy sources such as wind, and no West Virginia statutes or legislation suggest that wind turbines are an inappropriate source of new electric generation in this State. The generation of electricity from the Project using a renewable wind resource to generate electricity for 35,000 customers would be a step in the right direction. Accordingly, the Commission finds that Liberty Gap has demonstrated a need for the Project.

(c) Substantial and Positive Economic and Work Force Impact

The evidence presented to the Commission on how the Project would impact the State and local economies varied, but all of the evidence indicated that the Project's economic impact would be positive. Liberty Gap estimated the total Project cost at between \$170 million and \$190 million (Mr. Matthews' testimony, L.G. Exhibit no. 1 at p. 13). During construction, the Project will employ up to 200 people. (Id. at 6.) During operation, the Project will require six to twelve employees. (Id. at p. 11).

The three expert economists addressed varying positive impacts on jobs, cost of construction, business volume, indirect business impact, and total output. (See Childs' Study, L.G. Exhibit No. 2; Jin study, C.T. Exhibit No. 1; and Clinch study, FOBPC Exhibit No. 1). The Commission agrees with Dr. Clinch's statement that the three economists arrived at different results because they used different assumptions in their analyses. (Tr. II at p. 149). The studies also differed in that Mr. Jin's study was on a state level and Mr. Childs' study was on a county level. (Tr. II at pp. 150-51).

FOBPC's witness Dr. Clinch did not identify any significant errors in Mr. Childs' report and found the report to be consistent with other reports he had reviewed. While Dr. Clinch took issue with Mr. Childs' inclusion of the cost of the turbines (\$78 million) in his analysis (because the turbines would be purchased out of county and out of state (Tr. II at pp. 136-39)), Mr. Childs testified that his model did not assume the turbines would generate additional indirect or induced impacts to the county. (L.G. Exhibit no. 13 at p. 8; Tr. II at pp. 102-03). Based on the evidence before us, the Commission concludes that Liberty Gap witness Mr. Childs' projections are credible.

In addition to Liberty Gap witness Mr. Childs' projections about the economic benefits from the Project, Liberty Gap has entered into a binding commitment with the

Pendleton County Commission that guarantees a minimum of \$200,000 per year in property tax revenue and requires Liberty Gap to make an annual Community Partnership Grant to the Pendleton County Commission in the amount of \$110,000 (escalates to \$125,000 over time). (L.G. Exhibit No. 14 at p. 20 and Exhibit JC 3).

The Memorandum Agreement among U.S. Wind Force, LLC, Liberty Gap's parent company, and the North Central West Virginia State Building and Construction Trades Council and IBEW Local 596 and 17 other construction union locals is a significant economic value and ensures that workers used in the construction of the Liberty Gap Project will be local workers. (Mr. Snyder's testimony, C.T. Exhibit No. 2 at p. 2 and exhibit no.1). Mr. Snyder estimates that the project will generate 140,000 to 165,000 craft man-hours of work for local construction workers (C.T. Exhibit No. 2 at p. 2), and that Construction Trades workers will make between \$35 and \$48 an hour (this includes total benefits) depending on each worker's trade and skill level. (Tr. II at p. 182).

The evidence provided by Construction Trades supports conclusions that the Project would create construction jobs and that the State and local economies would benefit from the proposed Project.

(d) No Serious Risk of Impact on Wildlife, Other Than Birds and Bats

The preponderance of the testimony and evidence presented by Liberty Gap witness Poppleton, Liberty Gap witness Simpson, and FOBPC witness Simmons, indicates that the proposed Project would not pose a serious risk to legally protected species of plant or animal. (Poppleton testimony, L.G. Exhibit No. 4; L. G. Exhibit No. 18; Tr. III at pp. 112-22; Simpson testimony, L.G. Exhibit No. 5; L.G. Exhibit No. 20; Tr. III at pp. 162-64; Simmons testimony, FOBPC Exhibit No. 67; Tr. III at pp. 170-72).

(e) No Credible Showing of an Adverse Impact of Turbines on the Value of Surrounding Property and on Tourism

There continues to be a significant and real dispute among the parties about the impact of wind turbine projects on the value of surrounding property and the possible adverse impact of wind turbines on tourism. Unfortunately, the record that wind turbines have an adverse impact on property value and tourism is both inconclusive and unpersuasive.

FOBPC, Mr. Hargrove, Mr. and Mrs. Thomas, and Ms. Price responded to Liberty Gap's evidence showing a positive economic impact with the assertion that Liberty Gap's analysis failed to take into account the negative impact to real property values and Pendleton County's tourism industry. (*See generally* FOBPC witness Ms. Hoy, FOBPC Exhibit No. 3, Tr. II at pp. 248-49; Mr. Hargrove's testimony, Hargrove Exhibit No. 2; Mr. Thomas'

testimony, Thomas Exhibit No. 1; FOBPC witness Ms. Price, FOBPC Exhibit No. 4, Tr. III at pp. 20-26; and various citizen witnesses of FOBPC; Tr. III at p. 25-26). However, the Intervenor did not present market data supporting the inclusion of a negative factor for the presence of wind turbines near property. (Id; Liberty Gap witness Hyre testimony, L.G. Exhibit No. 16 generally and at p. 10; Staff witness Kellmeyer testimony, Staff Exhibit No. 3 at p. 6). FOBPC witness Hoy acknowledged that property values in Pendleton County are continuing to rise even with the possible construction of the Project. (Tr. II at p. 248). Similarly, Ms. Price acknowledged she had not done any studies to determine whether a negative impact on tourism resulted in places where there are wind turbines nor has she done any independent surveys of tourists visiting the area. (Tr. III at p. 25-26).<sup>5</sup>

Liberty Gap's witness Mr. Childs explained that his economic study did not address impact on tourism or local property values because he had reviewed surveys conducted by others, anecdotal reports from persons viewing the Mountaineer Project in Tucker County, and internet research that indicated that wind farms have little or no effect on tourism and property values. (L.G. Ex. No. 2 at p. 5; L.G. Ex. No. 13 at p. 4, Tr. II at p. 93, 95). Mr. Childs believes wind projects may result in an increase in tourism. (L.G. Ex. No. 13 at p. 4; Tr. II at p. 93).

Liberty Gap's witness Mr. Hyre stated that there has been no decline in Pendleton County property value since the Liberty Gap Project was announced in 2003. Instead, property values have continued to increase. (L.G. Ex. No. 16 at p. 3). He stated that tax assessments in Grant County show an increase in property value despite plans to construct the NedPower wind project. (Id. at p. 4, 5-6). Mr. Hyre's research in Tucker County indicated that the Mountaineer project did not negatively impact the property values there. (Id. at p. 8). Mr. Hyre believes Tucker, Grant and Pendleton Counties are similar. (L.G. Ex. No. 16 at p. 9).

The Commission believes that the preponderance of the credible evidence on this issue supports Liberty Gap; unfortunately, as we have indicated, much of the evidence presented by Intervenor in this case is of marginal probative value and relies on unsupported statements and hearsay or other unsupported reports and statements in the record. The Commission concludes that there has been no probative evidence that quantifies or supports a finding of a negative factor with respect to property value or tourism impacts from wind turbine projects generally, or from the Project specifically.

---

<sup>5</sup>Ms. Price's assertion that wind turbines do not help tourism was somewhat contradicted by her acknowledgment at the hearing that during a tourism convention she recently attended at Canaan Valley, 25 to 30 attendees elected to visit the Mountaineer project turbines when invited to do so by the convention's organizers. (Tr. III at pp. 23, 26).

Earlier this month, in *Burch et al v. NedPower Mount Storm, LLC and Shell Windenergy, Inc.*, No. 33201 (W. Va. June 8, 2007), the Supreme Court of Appeals of West Virginia reversed a decision of the Circuit Court of Grant County that this Commission's granting of a siting certificate collaterally estopped private landowners from bringing a nuisance claim for a prospective injunction. The Court held that a private nuisance action asserting injury (turbine-created light effects and noise; dangers from broken blades, ice throws, and collapsing towers; and diminution of property values due to proximity to turbines) to individuals' private property rights, "are not among the primary factors to be considered by the PSC when making siting decisions, nor is it the statutory task of the PSC to apply nuisance law." (*Id.* slip opinion at 14).

The Commission agrees with the Court that our focus on public interest may differ from a circuit court's consideration of a private nuisance action. The Commission is more concerned with view impact on public overlooks, and noise impacts on communities collectively, than with the private citizen's subjective feelings about changes to the view from his or her property or what he or she will hear. The Commission's concern with the protection of public places is evident from our decision in *Nedpower*, in which the Commission withheld certification to NedPower to build the Southern Phase of that Project because of the proximity of that phase to the Dolly Sods Wilderness Area. The Commission withheld granting a certificate for the Southern Phase unless NedPower could demonstrate that the 200 turbines in the Southern Phase could not be relocated into the Central and Northern Phases and that this inability would cause the Project to become financially unfeasible. (*NedPower Mount Storm, LLC*, Case No. 02-1189-E-CN, Commission Order entered April 2, 2003, Finding of Fact no. 237 at p. 99, and Conclusion of Law no. 12 at p. 102).

(f) Hydrology Evidence was Adequate

The evidence as to the Project's potential impact on hydrology was also in conflict. Liberty Gap's witness, Dr. Sherlock, believes potential impact to karst systems and storm-water runoff problems can be avoided by using proper construction techniques following completion of pre-construction geophysical and geotechnical studies. (L.G. Exhibit No. 11 at pp. 4-11). However, Liberty Gap's assurances must be considered along with the fact that Liberty Gap has not completed its Phase II of the Hydrological Study to identify water sources most likely to be impacted by the Project and Dr. Sherlock's research of cave hydrology in the area was not comprehensive. (Tr. IV at pp. 113-45). FOBPC's witness, Mr. Fleming, on the other hand, expressed concern that the Project and the transmission line would impact local water supplies and cave systems that serve as bat hibernacula. (Mr. Fleming's testimony, FOBPC Exhibit Nos. 78-79; report pp. 8-10).

The Commission concludes that the more compelling evidence is that the relatively small size of the nonpermeable portion of the Project will not negatively impact storm water run-off or karst systems. Furthermore, the storm water run-off concerns are alleviated by the fact that Liberty Gap will be required to obtain a general storm water permit from WVDEP, and to do so Liberty Gap will be required to submit a Storm Water Pollution Prevention Plan. (L.G. Exhibit No. 11 at pp. 14-16.

## **2. Issues For Which Evidence is Lacking or Otherwise Troubling**

For the remainder of the issues, to wit: (1) the historical and cultural impact of the Project on the Jack Mountain area, (2) the likelihood and extent of noise from the turbines, (3) government concerns about the impact on endangered bat species, and (4) the potential impact upon view from recognized public sites used as scenic overlooks, the record is more problematic, and these issues become extremely troublesome, given the balancing of interests test that the Commission is required to perform under *W. Va. Code* § 24-2-11c.

### **(a) Lack of Sufficient Evidence on Cultural Issues**

As indicated earlier, the Application and pre-filed direct testimony do not provide sufficient information for the Commission to reach a conclusion about the Project's impact on cultural resources in the surrounding area. Liberty Gap has the burden of establishing a *prima facie* case through its Application and pre-filed testimony that justifies granting the Application (*See, e.g., Siting Rule* 3.1.o). Liberty Gap's attempts to cure its early neglect were belated and incomplete as of the hearing date and were prejudicial to the procedural rights of the other parties.

Liberty Gap witness Mr. Smith is a Principal Investigator and Archeological Supervisor for Cultural Resource Analysts, Inc. (CRAI) (L.G. Exhibit No. 21 at p. 2). He explained that CRAI was initially hired to do preliminary work, including helping Liberty Gap understand its cultural resource needs. (Tr. II. at p. 57). After his rebuttal testimony was filed with the Commission on December 6, 2006, however, Liberty Gap hired CRAI to conduct archaeological studies and consult with SHPO. (Tr. II at p. 56-57). CRAI has still not completed the work of identifying historic properties and/or archeological sites that may be impacted by the Project. (L.G. Exhibit no. 21 at p. 2). Mr. Smith conceded at hearing that when he filed his rebuttal testimony he had not identified all culturally significant sites within a 5-mile radius of the Project. (Tr. II at pp. 56-57). Only after filing his rebuttal testimony on December 6, 2006, did Mr. Smith initiate the Phase I archeological survey. (Tr. II at p. 56). As of the hearing date, Mr. Smith had completed a review of SHPO's records for a 5-mile radius around the Project site and identified the sites within that zone. However, he had not assessed the impacts of the Project at those sites and had not transmitted the results of

that review to SHPO. Thus, he could not discuss potential impacts to cultural resources or any proposed mitigation plans. (Tr. II at pp. 58-59).

FOBPC witness Susan Pierce, Deputy State Historical Preservation Officer in the West Virginia Division of Culture and History, explained that as early as December 2004 her office responded to a letter from Liberty Gap regarding the Project. (Tr. I at pp. 103-04). In SHPO's December 2004 response letter, SHPO requested additional information from Liberty Gap so that SHPO could complete its review. Additionally, that letter outlined what SHPO expected. (Tr. I at p. 104). Ms. Pierce stated that the next correspondence between Liberty Gap and SHPO was "fairly recently" when a Liberty Gap consultant sought to initiate the identification process of the historic resources within the area of potential impact of the Project. (Tr. I at p. 106). The record does not contain the date of the recent contact to which Ms. Pierce referred, but the Commission gathers from Mr. Smith's testimony that this contact occurred after December 6, 2006. (Tr. II. p. 56-57). Regardless of the precise date of that letter, Ms. Pierce stated that Liberty Gap has not yet submitted a complete Phase I Archeological Study to SHPO. (Tr. I at p. 106). Thus, as of the date of the evidentiary hearing, Ms. Pierce said that neither her office nor Liberty Gap could accurately detail the cultural, historical, or archeological resources within the 5-mile radius of the Project. (Tr. I at p. 106).

In lieu of providing information regarding cultural impacts, Liberty Gap requested that the Commission grant its Application with a condition that Liberty Gap comply with the requirements of the SHPO. The appropriateness and legality of the granting of a siting certificate with such a condition is now pending before the Supreme Court of Appeals of West Virginia in the *Beech Ridge Energy, LLC*, Case No. 05-1590-E-CS. FOBPC's argument in the instant case is the same as Intervenor Mountain Communities for Responsible Energy's position in *Beech Ridge* – that conditional certificates should not relieve applicants from compliance with the Commission's rules requiring an applicant to provide information related to the potential impacts and mitigation plans regarding cultural resources. At this stage, however, the record in this proceeding is virtually devoid of evidence on this issue, and the Commission is unable to say whether the Jack Mountain area contains significant cultural, historical or archeological resources that might be impacted by the Project.

*Beech Ridge* is distinguishable from this case. The Commission's January 11, 2007 Order in *Beech Ridge* noted Liberty Gap's cultural disclosures. At Finding of Fact number 12, the Commission found: "Beech Ridge's map - which shows recreational areas, eleven churches, three cemeteries, and three historical sites - is based upon data from WVU's GIS Technical Center; SHPO for historical and cultural areas; and local brochures for recreation, tourism and cultural areas." In Conclusion of Law number 4 in *Beech Ridge* the Commission held: "While Beech Ridge's five-mile map was not perfect, it showed the majority of the

area's cultural and historical interests, as well as the other items required by the Commission's *Siting Rules*. Accordingly, Beech Ridge's five-mile map was sufficient under the Commission's *Siting Rules*." In addition, Beech Ridge and Westvaco (property owner of land on which the Beech Ridge project would be built) presented the testimony of three witnesses who addressed land use, map features and cultural resources. Thus, the evidence presented in *Beech Ridge* provided the Commission with information as to the major cultural and historical interests relevant to that application.

Liberty Gap, however, failed to meet its burden with respect to cultural disclosures or impact mitigation. There is no evidence in the record on this matter other than the extremely late effort by Liberty Gap to approach CRAI to undertake the archaeological study. (Tr. II. pp. 56-59). That effort was and is too little, too late.

(b) Insufficient and Conflicting Noise Evidence

There is disparity in the evidence (and difference of opinion) on the noise levels created by the wind turbine projects. Noise levels from wind turbine projects vary or are affected by the type and nature of the turbine, weather, ground cover, distance, ambient noise, leaf and foliage cover, elevation, wind direction, state of the science as applied to wind turbines and detection of sound from wind turbine projects, and a host of other factors. The developer and the Commission are charged with estimating, in general terms, the noise level of the Project on anyone who might be a likely "noise receptor." The growing body of evidence and experience about the possible impact from noise at other wind turbine projects, the potential impact from the Liberty Gap Project, and the issues regarding noise testing near the Project, are a concern for the Commission. Unfortunately, we cannot be certain about the noise impact until after the Project is constructed. During the Application process, we can only react to the evidence and the questions raised in the proceeding.

Moatstown is the nearest community to the Project on Jack Mountain, and according to the evidence presented at the hearing, is slightly more than 2,000 feet from the nearest wind turbine in the Project. (Barnes' testimony, Tr. III at p. 44). Liberty Gap provided insufficient evidence about the level of ambient noise at Moatstown. Because of the lack of evidence on this issue, the Commission is unable to assess adequately whether noise from the Project will be disturbing to persons residing in the 20 to 30 homes in Moatstown.

FOBPC's witness on noise, Mr. Richard H. Bolton, raised concern about where and how Liberty Gap conducted its ambient noise measurements. Although Mr. Bolton acknowledged that he is not an expert on noise, he is a physicist (Tr. III at p. 98) and brought the issue regarding Moatstown to the Commission's attention. (Mr. Bolton's testimony, FOBPC Exhibit No 65, report at pp. 3, 8).

Mr. Barnes took preconstruction ambient sound measurements at four monitoring locations around the Project area over a one-week period in March 2006. He stated that he identified noise sensitive receptors such as residences, churches and cemeteries. (L.G. Exhibit No. 7 at p. 4). He testified that most of the four monitoring locations were near homes or small groups of homes and seasonal hunting cabins (these monitoring stations were located 4,390 feet to 9,830 feet from the nearest proposed turbine site). (L.G. Exhibit No. 7 at p. 4).

In response to Mr. Bolton's criticism that Mr. Barnes sampled only four monitoring locations, Mr. Barnes stated his field experience and education dictated the use of only four measuring locations. This decision was based on land use, nearest sensitive receptors, industry standards, experience, access, representative sampling, and securing. (L.G. Exhibit No. 12 at p. 6).

In response to Mr. Bolton's note that studies in Europe of areas similar to Pendleton County recommend setbacks of one mile or more to reduce noise impact, (FOBPC Exhibit No. 65 report at p.10), Mr. Barnes disagreed that one-mile set backs should be required for the Liberty Gap Project because background noise levels are reached at around 4,000 feet. Mr. Barnes stated his belief that very few noise receptors that are in use year round are located closer than 4,000 feet to the turbines. (L.G. Exhibit No. 12 at p. 10). This statement is in conflict with the testimony that the nearest sensitive noise receptors are located in Moatstown, about 2,030 feet from the nearest turbine. In fact, there are 20 to 30 homes in Moatstown. (Mr. Barnes' testimony, Tr. III at p. 62).

Liberty Gap used an ambient noise sampling technique by placing monitors around the Project to calculate an average ambient measurement in a variety of conditions over the course of a week's time. The sampling technique calls for a noise expert to mathematically project ambient noise at other locations based on the average ambient noise from the monitoring stations. This technique has been used in other cases before the Commission. Liberty Gap's focus on project noise impact at 4,000 feet from the nearest turbine (the nearest ambient noise monitor was located at 4,390 feet), when the nearest Moatstown sensitive noise receptor is located a little over 2,000 feet from the nearest turbine and there are 20 to 30 homes around Moatstown, causes the Commission to question the predictability of noise estimates on Moatstown.

Mr. Barnes acknowledged that wind turbines have "a modulation component that is a variation in loudness caused either by attenuation or Doppler shifting" that is, the periodic swooshing sound reported by listeners. (Tr. III at p. 54). He also acknowledged that "[t]he modulation is one characteristic that does draw people's attention to a sound source, much like other types of characteristics that people can pick up on, crying babies in the background, you very quickly can pick up on that and even identify whether it's their child



or not.” (Tr. III at p. 55). Mr. Barnes explained that as long as the ambient sound is not above the modulations caused by wind turbines, people will be able to pick out the modulations in the ambient noise. (Tr. III at p. 56). However, Mr. Barnes said it is possible for the wind to be blowing on Jack Mountain while it is calm in the valley (Tr. III at pp. 52-53) and that on occasion some noise might be heard from the Liberty Gap turbines due to atmospheric conditions. (L.G. Exhibit No. 12 at p. 13).

Moatstown is not located in a valley where land formations shield homes from wind. Mr. Barnes stated that while the turbine noise level would be similar to the ambient noise level, the turbines might cause fluctuating noise. (Tr. III at p. 64). Mr. Barnes went on to explain whether the noise fluctuations could be disturbing to individuals:

Whether it's disturbing or not, it really would be how people, I believe, would receive the sound on a non-acoustic basis, I think. And there are other factors that are coming into play. They'll take the sound level by itself. The sound itself would be objectionable over the long term, but there may be some other factors that come into play.

(Tr. III at pp. 64-65). Mr. Barnes believed that over a period of time the noise could be objectionable in Moatstown. (Tr. III at p. 65). Mr. Barnes continued to maintain that, because Moatstown is relatively exposed and background noise levels will be elevated when the wind turbines are operating, noise generated by the turbines should not be noticeable. However, he said it is possible for the wind to exist on Jack Mountain while it is calm in Moatstown. (Tr. III at p. 66). Under those conditions, Moatstown residences would hear the turbines, and the noise would be noticeable if the residences were downwind. (Tr. III at pp. 66-67). Mr. Barnes acknowledged that he did not know if the prevailing wind at Moatstown was downwind or upwind, but he stated he made his noise projections based on worst case scenario projections by assuming downwind conditions when calculating his projections. (Tr. III at p. 84).

Mr. Barnes agreed that it made sense that a home 2,000 feet away from the nearest turbine would be more likely to perceive turbine noise than a home that is 4,000 feet away from the nearest turbine. He noted, however, that whether a person would hear the sound at 2,000 feet from the nearest turbine depends on that person's activities and whether the person is indoors or outdoors. (Tr. III at pp. 71-72). Mr. Barnes stated that just because a person can hear noise does not necessarily mean he or she will be disturbed by it. (Tr. III at p. 72).

Liberty Gap's expert believes that in certain conditions people in Moatstown could detect a swooshing or fluctuating sound from the Project turbines and that people may be disturbed by the sound. (Tr. III. pp. 64-65). Common sense indicates that a difference

certainly exists in what a person could hear 2,030 feet from the nearest turbine compared to a person who is 4,000 feet from the nearest turbine. Thus, the Commission concludes that insufficient evidence is before us to assess the potential noise impacts at Moatstown.

(c) Government Concerns with Endangered Bat Species

The evidence clearly indicates that turbines in the eastern United States cause substantially higher rates of bat mortality than in other regions of the country. (Roy testimony, L.G. Exhibit No. 3 at p. 3; Tyrell testimony, L.G. Exhibit No. 9 at p. 5; Reynolds testimony, L.G. Exhibit No. 8 at p. 3). Moreover, Liberty Gap's experts testified that the Mountaineer wind farm in West Virginia has the highest recorded per turbine collision mortality rate in the world. (Reynolds testimony, Tr. III at p. 189; Tyrell testimony, *Id.* at 276, Kellmeyer testimony, Tr. 5 at p. 17). While the bat experts have different theories on why the turbines cause higher mortality for bats than for other avian species, the experts really do not know why bat mortality rates have been so high at the wind farms in the eastern United States, including the wind farm in West Virginia. (Tyrell testimony, L.G. Exhibit No. 24 at pp. 3, 5-6 and Tr. III at p. 302; Reynolds testimony, L.G. Exhibit No. 8 at p. 3).

Liberty Gap's expert, Mr. Roy, stated that the Liberty Gap Project will impact bats. (Tr. III at p. 260). Dr. Tyrell stated that the impact of the Project to non-listed species of bats cannot be determined at this time, but felt that the experiences of Mountaineer and Meyersdale (a wind project in southern Pennsylvania) could not be directly extrapolated to the Liberty Gap site as called for by USFWS. (L.G. Exhibit No. 24 at pp. 3, 24). Dr. Reynolds, however, believes the Mountaineer and Meyersdale sites are similar to the Liberty Gap site, and it would be valid to extrapolate bat mortality from the Meyersdale and Mountaineer sites to the Liberty Gap site. (L.G. Exhibit No. 23 at pp. 3-4). Dr. Reynolds noted that the pre-construction data from the Liberty Gap site suggested that spring migratory activity rates are higher than the fall migratory rates. That is inconsistent with actual mortality statistics from each of the post-construction sites. (L.G. Exhibit No. 8, SR 2 at p. 17). Dr. Reynolds believes that the Liberty Gap Project will experience bat mortality on the same order of magnitude as the Mountaineer and Meyersdale wind farm sites. (L.G. Exhibit No. 23 at p. 9).

Although the Commission feels that overall Liberty Gap had the more persuasive evidence on the issue of the potential impact of the Project on bats and particularly endangered bats, at this stage the Commission is still faced with strong, but conflicting, evidence about the impact of turbines on all bats. The Commission's primary concerns, however, with the evidence in this case about the impact of the Project on bats is that Liberty Gap is not further along in its efforts to obtain an HCP and an ITP for endangered species of bats. Liberty Gap had notice that USFWS had serious concerns about listed bats and recommended Liberty Gap pursue an ITP long before Liberty Gap decided to do so. The

Commission particularly notes the following correspondence between State and Federal agencies and Liberty Gap on the bat issue: (1) the WVDNR's communication to Liberty Gap's consultant of the presence of rare and endangered species of bats near the project site (WVDNR letter dated December 6, 2005 to ECT, L.G. Exhibit No. 20, PS No. 4); (2) USFWS communication to Liberty Gap's consultant of, among other things, the presence of rare and endangered bat species in the Project area advising the Applicant as to its responsibilities under the ESA, and urging expert studies as to temporary and spatial use of the project by bats as well, and other research. (USFWS letter dated March 7, 2006 to ECT, L.G. Exhibit No. 20, PS No. 4); the USFWS letter dated March 7, 2006, to Mr. Matthews stating concerns about the proximity of endangered bat species to the Project site and strongly recommending further coordination with regard to the ESA. (USFWS letter dated March 7, 2006, to Mr. Matthews at pp. 2, 10; Staff Exhibit No. 2) the USFWS's letter in June 2006 indicating a high likelihood of use of the Project area by endangered species and a reasonable certainty of bat mortality from operation of the Project (USFWS letter to Applicant's counsel dated June 30, 2006, Staff Exhibit. 2); USFWS correspondence with Liberty Gap in September 2006, stating USFWS's conclusion that "the proposed project would have a reasonable certainty of resulting in take of species protected by the ESA," that "the risk of mortality of listed bats is significantly higher at the Liberty Gap site than at other studied sites in the eastern forest region," that "we conclude with reasonable certainty that during the operational life of the project, federally-listed species will be taken," that "the Service continues to recommend that Liberty Gap pursue a section 10 permit" and generally disagreeing with Liberty Gap's experts who concluded the Project would have little impact on listed bats. (USFWS letter to Linda Bouvette, September 28, 2006, at pp. 1, 2, 7, 8; Staff Exhibit No. 2; FOBPC Cross Exhibit 1).

In addition to the USFWS's strong opinion that the Project would take endangered bat species, Liberty Gap was also on notice that expert literature and testimony unanimously indicated that too little is known about bat behavioral response to turbines to reasonably mitigate bat mortality. In light of the foregoing, the Commission does not understand (or condone) Liberty Gap's reluctance to cooperate with state and federal wildlife agencies prior to December 8, 2006, when it finally communicated its intent to commence a voluntary HCP process and application for an ITP. (USFWS letter to Mr. Cookman dated December 4, 2006; Staff Exhibit No. 2).

The Commission is faced with making the decision regarding bats and is inclined to give credence to the concerns of the USFWS and WVDNR. Even after Liberty Gap initiated talks with USFWS, it had not, as of the date of the hearing, filed a HCP or ITP application. (Tr. III at p. 307). Liberty Gap's bat expert, Dr. Karen Tyrell, testified that as of April 23, 2007, Liberty Gap had not yet determined whether an implementing agreement would be appropriate. This testimony indicates that as of the hearing date, Liberty Gap had not made a commitment to complete the HCP/ITP process. (Tr. III at 307). Because of the

Commission's concern regarding the possible impact of the Project on endangered bats, the Commission, in its December 14, 2006 Order, required Liberty Gap to file bi-monthly progress reports as to its ITP/HCP progress. Unfortunately, the progress reports describe talks and meetings, but not concrete action on an ITP application. *See* bi-monthly reports in case file filed January 16, 2007, March 15, 2007 and May 15, 2007.

Liberty Gap's delay in filing, followed by its reluctance to commit to the HCP and ITP process, in the face of USFWS concern about the "reasonable certainty" of danger to endangered species of bats is troubling. Given the circumstances of the Jack Mountain site, the Commission believes that Liberty Gap should have made greater efforts to apply for the ITP earlier and filed the ITP as a part of the processing of the Application. The Commission, at this point, should be informed as to the final position of the USFWS on the threat to the Virginia Big-Eared Bat and the Indiana Bat. As it is, the Commission is faced with conflicting expert evidence and opinion, and the USFWS clearly indicating that it believes the Project will cause death of endangered species. (*See* Staff Exhibit No. 2).

These circumstances cause additional complexity in any balancing of interests and give rise to Commission concern about whether Liberty Gap's submission of evidence with respect to bat impacts and the possible steps to ameliorate those impacts, standing alone, can be considered sufficient to balance the interests on the Project.

(d) Failure to Satisfy its Evidentiary Burden Regarding View From Public Places

For the reasons stated about the adequacy of the Application earlier (*see* pp. 25-21), Liberty Gap has failed, based on the evidence, to meet its burden that the Project turbines will not significantly and adversely impact views from recognized public sites used as scenic overlooks. Specifically, the Commission finds that viewshed impact is a potential significant issue for the following sites: Reddish Knob; Spruce Knob; Entrenchment Overlook on U.S. 250, Shenandoah Mountain; High Knob Tower; Confederate Prayer Service Site on U.S. 220; and the Shenandoah Mountain Overlook, U.S. 33. Liberty Gap asserted that its renderings showed that while the turbines would be visible at Spruce Knob and Reddish Knob, the impact would be minimal. (Mr. Matthews' testimony, L.G. Exhibit No. 1 at p. 20; Mr. Llewellyn's testimony, L.G. Exhibit No. 17 at p. 13; Tr. I at pp. 185-86). Liberty Gap did not make an effort to determine the number of turbines that would be seen from certain sites because Liberty Gap did not believe it mattered whether one could see one turbine or six turbines. (Mr. Llewellyn's testimony, Tr. I at p. 190).

Reddish Knob is a well-known National Forest Service site, is part of the George Washington/Jefferson National Forest and is 11.8 miles from the Project site. (Mr. Friend's testimony, L.G. Exhibit No. 15 at pp. 4, 6-7; Mr. McNeely's testimony, FOBPC Exhibit No.

75, p. 1). All of the turbines will be visible from Reddish Knob on a clear day, although they will appear small from that viewpoint. (L.G. Exhibit No. 25, DF Exhibit No. 2).

The Spruce Knob Observation Tower is a National Forest facility and the highest point in West Virginia. It is a tourist attraction. The Tower is 13.6 miles from the Project Site. (Mr. Friend's testimony, L.G. Exhibit No. 15 at pp. 4, 6-7; Mr. McNeely's testimony, FOBPC Exhibit No. 75, p. 2). Although in Liberty Gap's simulated photograph taken from the Spruce Knob Observation Tower, the Commission could hardly make out any towers (L.G. Exhibit No. 25, DF Exhibit No. 3) Liberty Gap acknowledged that on the date and time the photograph was taken, haze had begun to build. (Mr. Friends' testimony, Tr. IV at pp. 80-81). Liberty Gap explained that in the absence of haze, the view of turbines from the Spruce Knob Observation Tower would have been similar to the view shown in the picture taken from Reddish Knob, except that the turbines would have appeared smaller due to the increased distance. (Mr. Friend's testimony, Tr. IV at p. 81). When viewed from the Spruce Knob Observation Tower, the turbines would be shown against a green background instead of against a light blue sky background. (*Id.* at pp. 83-84). FOBPC acknowledged that the observation tower view is partially screened by vegetation, but stated from the viewpoint on a rock ledge to the South of the nature trail the view of the Project would be unobstructed. (Mr. McNeely's testimony, FOBPC Exhibit No. 75, p. 2.). Additionally, FOBPC noted that from Spruce Knob one would see the white objects against a green background. (Mr. McNeely's testimony, Tr. IV at p. 45). The Commission concludes that on a clear day, the white turbines may be noticeable against a green background when viewed from Spruce Knob.

Entrenchment Overlook on U.S. 250, Shenandoah Mountain is a National Forest Service site and is part of the George Washington-Jefferson National Forest, and the southern trailhead for the National Forest Service Shenandoah Mountain Trail. This site is located from approximately 11 miles to 15 miles from the proposed Project site depending on which turbine is considered. (Mr. McNeely's testimony, FOBPC Exhibit No. 76, p. 3). Liberty Gap acknowledged that the Project is visible from this site, but believes vegetation would obscure much of the view of the Project. (Mr. Llewellyn's testimony, L.G. Exhibit No. 17 at pp. 14-16; Mr. Friend's testimony, L.G. Exhibit No. 15 at pp. 8-11). FOBPC stated that all of the turbines could be seen from this site, but the view of the northern end of the Project is seasonally screened by vegetation. (Mr. McNeely's testimony, FOBPC Exhibit No. 76, p. 3). The Commission concludes that some of the Project may be seen from this site and that the turbines would appear similar to how they would look from Reddish Knob because of the similar distance.

The High Knob Tower is a historic former fire tower owned by the National Forest Service as part of the George Washington-Jefferson National Forest. FOBPC stated that all of the turbines can be seen from this location. Both the Shenandoah Mountain Trail and

High Knob Trail are National Forest Service Trails on the west side of the Shenandoah Mountain. While the Project is approximately 13 miles to 18 miles from High Knob Tower depending on the turbine (Mr. McNeely's testimony, FOBPC Exhibit No. 76 at p. 4), Liberty Gap agreed that the turbines would be visible from High Knob Tower but that the distance would make the turbines almost indistinguishable. (Mr. Friend's testimony, L.G. Exhibit No. 15 at pp. 8-11). The Commission concludes that the turbines may be seen from High Knob Tower, but that distance would make them less apparent than they would be from the Spruce Knob Observation Tower.

The Confederate Prayer Service Site on U.S. 220 is a historic site on U.S. 220 south of Franklin that is located approximately seven miles from the Project site. FOBPC believe that on a clear day 375 feet of 17 turbines will be visible from this site although there will be some partial local vegetative screening. (Mr. McNeely's testimony, FOBPC Exhibit No. 76, p. 14). Liberty Gap believes that the end of the turbine array will be visible from this site, but will be partially obscured by vegetation. (Mr. Llewellyn's testimony, L.G. Exhibit No. 17 at pp. 14-16; Mr. Friend's testimony, L.G. Exhibit No. 15 at pp. 8-11). Given the proximity of this site to the Project, turbines could be seen and could be clearer to a viewer on a clear day than the view of turbines from Reddish Knob.

The Shenandoah Mountain Overlook, U.S. 33 is an overlook from a West Virginia Department of Highways developed parking lot on top of Shenandoah Mountain and the northern trailhead for the National Forest Service's Shenandoah Mountain Trail, which is part of the George Washington-Jefferson National Forest. The site is located 13 to 18 miles away from the Project depending on the turbine. (Mr. McNeely's testimony, FOBPC Exhibit No. 76, p. 17). FOBPC stated that all of the turbines would be visible from this site. (Mr. McNeely's testimony, FOBPC Exhibit No. 76, p. 17). Liberty Gap agreed that the Project would be seen in full from this scenic overlook, but that the distance would drastically reduce the viewshed impact. (Mr. Llewellyn's testimony, L.G. Exhibit No. 17 at pp. 14-16; Mr. Friend's testimony, L.G. Exhibit No. 15 at pp. 8-11). The Commission concludes that the turbines would appear in size similar to how they will appear at the Spruce Knob Observation Tower based on the distance.

As noted earlier in this Order, the Commission has a concern regarding view from public sites more than from private land. All of the sites discussed above are State and/or National view sites that currently have undisturbed vistas. The Commission is not holding that any view of a wind turbine from any public site makes that project site, *per se*, inappropriate for wind turbines nor is the Commission holding that, in this case, the views of the Project discussed above make the Project inappropriate. The Commission needs to make the decision of public view impact on a case-by-case basis.

Although the Project will be less visible from some sites than from others, the evidence on view presented to the Commission is conflicting, and the Commission must conclude that Liberty Gap has not shown by the preponderance of the evidence that the Project will not impact the public views of each to some degree. The focus of our concern regarding the view from Spruce Knob, the highest point in West Virginia, is similar to our concern of the Dolly Sods viewshed in *Nedpower*. As noted earlier in this Order, the Commission withheld granting a certificate for a phase of a project to the applicant in *Nedpower* because of concerns about the impact of a wind turbine project on Dolly Sods, a unique and singularly spectacular viewpoint in West Virginia. See *Nedpower Mount Storm, LLC*, Case No. 02-1189-E-CN.

**C. Based on the Record the Commission Cannot Perform the Statutory Balancing Test**

The two-part balancing test that the Commission performs in order to fulfill its mandate under *W. Va. Code* § 24-2-11c(c) was first set forth in *Longview Power LLC*, Case Nos. 03-1860-E-CS (Order issued August 27, 2004) and Case No. 03-1860-E-CS and 05-1467-E-CN (Order issued June 26, 2006). Through the application of the balancing test to evidence presented in siting application cases the Commission “apprais[es] and balanc[es] the interests of the public, the general interests of the State and local economy, and the interests of the applicant” and renders a decision. The Commission explained its two-part analysis on page 102 of its June 26, 2006 order:

In Part One of the analysis, the Commission performs its duty to appraise and balance: (a) an applicant’s interest to construct an electric wholesale generating project; (b) the State’s and region’s need for new electrical generating plants; and (c) the economic gain to the State and the local economy, against: (i) community residents’ interest in living separate and apart from such project; (ii) a community’s interest that a project’s negative impacts be as minimally disruptive to existing property uses as is reasonably possible; and (iii) the social and environmental impacts of the proposed project on the local vicinity, the surrounding region, and the State.

The Commission performs Part Two of its analysis only if it determines in Part One that, taken as a whole, positive impacts relating to the various interests outweigh the negative impacts on the various interests. (See *West Virginia Code* § 24-2-11c(c)). In Part Two the Commission decides whether a project’s public funding, if any, and property tax abatement, if

any, offends the public interest. (*West Virginia Code* § 24-2-11c(c)).

Within prongs (i) (ii) and (iii) of Part One of the balancing test, the Commission considers issues such as a Project's impact on existing cultural features of a community, viewshed, noise, non-listed and endangered bats.

As stated earlier in this Order, even if the Commission were to conclude that Liberty Gap's Application met the requirements of the *Siting Rules*, which we do not hold, and proceeded with balancing the statutorily mandated interests in this case, the lack, or inconclusive nature, of the evidence presented at the hearing would not allow the Commission meaningfully to assess the three prongs of the test. While the record contains sufficient information and testimony on prongs (a) (b) and (c), (*see* Commission's discussion of the issues for which satisfactory evidence is on the record, *supra* pp. 21-25), the record does not contain sufficient or timely information on all of the community and environmental impacts. For these reasons, the Commission does not believe that it could perform the balancing tests based on the record before it in this case.

#### **IV. FUTURE APPLICATIONS AND EVIDENCE**

The Commission has processed several applications under its *Siting Rules* and is concerned about the apparent inability (or unwillingness) of Applicants to comply with provisions of those *Siting Rules*. In light of that, the Commission finds it appropriate to provide future applicants and parties to siting certificate proceedings with additional guidance as to the application process and the weight the Commission will accord to evidence that may be presented in future cases.

The Commission has put a great deal of effort into developing the *Siting Rules* and the format and requirements for an Application. In that regard, the Commission urges future applicants not to treat lightly the Application requirements. Applicants need to understand that the *Siting Rules* are in place to give the Commission, the public and other stakeholders a fair assessment of the Project in order to determine whether to oppose or support those projects. There is frequently a rush to get these applications "in the Commission hopper." The Commission urges caution.

While subsequent testimony can certainly amplify and shape the process, the Application is extremely important, and the Application, and accompanying testimony, should comply with the requirements of the *Siting Rules*. Although some matters (NPDES permits and other post construction certification processes and permits) cannot be provided at the time of the filing (or for that matter at the time of the Commission's decision) (*see* testimony by Mr. Perdue, Tr. V at pp. 45-6), other requirements under the *Siting Rules* must



be met to the extent the applicant is reasonably able to do so. It is not sufficient to avoid compliance by saying that there will be no impact or that these matters will be addressed later.

Another area of significant concern for the Commission in these proceedings is the amount and quality of evidence adduced at the hearing. Although the Commission is not bound by the *Rules of Evidence*, *per se*, the Commission is troubled by the proliferation of testimony in these siting proceedings that is marginally relevant and, in some instances, unfair. The Commission is sympathetic to the cost of preparing testimony and retaining witnesses to sponsor that testimony and is also somewhat sympathetic to the procedural challenges facing *pro se* intervenors. By the same token, the Commission is extremely concerned by the large amount of testimony and exhibits that have been proffered as "evidence" in these proceedings that has little or no probative value. All attorneys and all parties, including Intervenor (by counsel or *pro se*), to these proceedings, and all protestants should be aware that the Commission believes that the parties should have the opportunity to conduct meaningful examination of evidence. The Commission accords little weight to references to unsupported or unsponsored studies, reports on unrelated projects from other jurisdictions, newspaper articles, or references to third-person hearsay evidence, and in future proceedings will be requiring parties to more strictly adhere to basic fairness in submitting testimony and exhibits.

## **V. FINDINGS OF FACT**

### **The Application**

1. The Application filed by Liberty Gap seeks a siting certificate authorizing the construction and operation of up to 50 wind turbines, each with a rated capacity of between 1,500 and 3,000 kilowatts, and certain ancillary facilities, and to construct a 138 kV transmission line to interconnect the Project to the Allegheny Power System (APS) electric transmission system. The total output of the Project would be up to 125 megawatts and the Project would be constructed and operated to generate electricity exclusively for the competitive wholesale market in West Virginia and other locations. (Application, L.G. Exhibit No. 10).

2. Liberty Gap is owned by US Wind Force, LLC, a Delaware limited liability company. *Id.*

3. The Project would generally be located along approximately seven miles on the Jack Mountain ridge top approximately ten miles outside of Franklin in Pendleton County, West Virginia. *Id.*

4. The transmission line corridor would begin at the North Franklin Substation and run south approximately 17.25 miles to the Project site. *Id.*

5. The total estimated cost of the Project is between \$175 million and \$190 million dollars (L.G. Exhibit No. 1 at p. 13), and there is no public funding associated with the Project. (*Id.* at p. 14).

6. Liberty Gap would operate the Project as an exempt wholesale generator as defined under Section 32(a) of the *Public Utility Holding Company Act of 1935*. (Application, L.G. Exhibit No. 10).

7. Liberty Gap received waivers of certain *Siting Rule* application requirements, including: *Tariff Rule* 42 filing requirements; the requirement to provide information related to fuel quantity, quality, storage and transportation found in *Siting Rule* 3.1.c; the requirement to provide information pursuant to *Siting Rule* 3.1.c. relating to air and water emissions; the requirement of *Siting Rule* 3.1.g.2. to provide an aerial photograph for a one-mile radius from the generating project that is less than one year old; the requirement to provide a map showing fuel and waste facilities and water supply and sewage supply under *Siting Rule* 3.1.h; the requirement to provide a still rendering depicting structures at ground level and scaling a six-foot tall figure in near proximity to the structures on certain conditions; and the requirement of *Siting Rule* 3.1.k.1. to provide a natural and man-affected water budget for this Project. (Commission Order issued January 31, 2006; Commission Order issued April 12, 2006).

8. Liberty Gap was denied waivers of other *Siting Rule* application requirements, including: the requirement to provide a generating project pre-construction map having at least a one-mile radius from the Project showing topographic contours, existing vegetation cover, individual structures and installations, surface bodies of water, and water, gas, and oil wells; the requirement to provide *pro forma* financial statements pursuant to *Siting Rule* 3.1.l.; denied in part the requirement to provide a map of aquifers that may be directly affected by the Project under *Siting Rule* 3.1.k.3; and the requirement to map water wells within one-mile of turbine sites and transmission line path. (Commission Order issued April 12, 2006; Commission Order May 31, 2006).

9. The Commission's December 14, 2006 Order required Liberty Gap to make bi-monthly status report filings on the progress of its voluntary Habitat Conservation Plan (HCP) process and its application for an Incidental Take Permit (ITP) for the Project with the USFWS.

10. Liberty Gap filed its first bi-monthly HCP/ITP progress status report on January 16, 2007; the second on March 15, 2007; and the third on May 15, 2007.

### The 5-Mile Map and Cultural Impact

11. Other than providing a map showing the boundaries of National Forests and wildlife management areas, Liberty Gap's 5-mile radius map did not designate existing land uses; public or private recreation hunting, fishing or similar areas; and parks, historic areas or places, or archaeological places. (Application, L.G. Exhibit No. 10).

12. Liberty Gap eventually filed a revised 5-mile radius map (L.G. Exhibit No. 17, Exhibit WL 4) with its rebuttal testimony, but that map was not provided until 12 months after the filing of the Application.

13. Liberty Gap created the 5-mile map by downloading a base map from the West Virginia GIS Technical Center web page. Mr. Llewellyn did not know the date the base map was made, nor did he know the date of any revision. (Tr. I at p. 183, L.G., Exhibit No. 10, tab 13). Mr. Llewellyn could not verify whether the downloaded base map accurately reflected land use, recreational areas, forest areas, etc. and acknowledged that he did not visit the area where the Project would be located to determine land use and cultural and historical features when preparing the original 5-mile map. (Tr. I at pp. 184-85).

14. Other than noting the location of churches, Liberty Gap did not provide any information regarding the cultural impact of the Project or any potential impacts on any cultural resources located within a 5-mile radius of the Project. (Application, L.G. Exhibit No. 10).

15. The Application stated only that Liberty Gap believed the Project would have no impact on historical or archaeological resources within Pendleton County. (L.G. Exhibit No. 10. at p. 120).

16. Liberty Gap contracted with Cultural Resource Analysts, Inc. (CRAI) to complete an archaeological survey, but the arrangements with CRAI were not made until December 2006, and CRAI only recently contacted SHPO. (Tr. I at p. 106; Tr. II. at p. 56-57).

### The Viewshed Impact

17. Liberty Gap filed only six renderings of the Project in the Application – those were from Reddish Knob, the Spruce Knob Observation Tower, and four views from sites near the Project site (L.G. Exhibit No. 25).

18. Liberty Gap did not acknowledge or provide in its Application renderings of how the Project will look from the following public scenic overlooks: Entrenchment Overlook on U.S. 250, Shenandoah Mountain; High Knob Tower; the Confederate Prayer Service Site on U.S. 220; and the Shenandoah Mountain Overlook, U.S. 33. (See L.G. Exhibit No. 25; FOBPC Exhibit No. 76).

#### General Information About Liberty Gap

19. As of the date of the evidentiary hearing, Liberty Gap estimated that it had spent over \$2,500,000 on the Project. Additionally, Liberty Gap has entered into a power purchase agreement that identifies a purchaser for the power generated by Liberty Gap at a guaranteed price. (L.G. Exhibit No. 14 at p. 32-34).

#### The State and Regional Need for the Project

20. ECAR reports a need for additional generation. (LG. Exhibit No. 1 at pp.4-6).

21. Liberty Gap would offer an emissions-free alternative form of energy and the Project would produce enough electricity to serve over 35,000 electric customers. (Mr. Matthews' testimony, L.G. Exhibit No. 1 at pp. 4-8).

#### Economic and Work Force Impact

22. Liberty Gap estimated the total Project cost at between \$170 million and \$190 million (Mr. Matthews' testimony, L.G. Exhibit no. 1 at p. 13). During construction, the project will employ up to 200 people. (*Id.* at 6.) During operation, the Project will require six to twelve employees. (*Id.* at p. 11).

23. While the evidence on how the Project would impact the State and local economies varied, all of the evidence indicated that the Project's economic impact would be positive. (See Child's Study, L.G. Exhibit No. 2; Jin study, C.T. Exhibit No. 1; and Clinch study, FOBPC Exhibit No. 1).

24. The three expert economists addressed varying positive impacts on jobs, cost of construction, business volume, indirect business impact, and total output. (See Child's Study, L.G. Exhibit No. 2; Jin study, C.T. Exhibit No. 1; and Clinch study, FOBPC Exhibit No. 1). The three economists arrived at different results because they used different assumptions in their analyses. (Tr. II at p. 149). The studies also differed in that Mr. Jin's study was on a state level and Mr. Childs' study was on a county level. (Tr. II at pp. 150-51).

25. Liberty Gap has entered into a binding commitment with the Pendleton County Commission that guarantees a minimum of \$200,000 per year in property tax revenue and requires Liberty Gap to make an annual Community Partnership Grant to the Pendleton County Commission in the amount of \$110,000 (escalates to \$125,000 over time). (L.G. Exhibit No. 14 at p. 20 and Exhibit JC 3).

26. Construction Trades estimated that the project would generate 140,000 to 165,000 craft man hours of work for local construction workers (Snyder testimony, C.T. Exhibit No. 2 at p. 2), and that workers would make between \$35 and \$48 an hour (this includes total benefits) depending on each worker's trade and skill level. (Tr. II at p. 182).

#### Impact of Turbines on the Value of Surrounding Property and on Tourism

27. There was no credible evidence of market data supporting the inclusion of a negative factor for the presence of wind turbines near property. (See generally Hoy testimony, FOBPC Exhibit No. 3, Tr. II at pp. 248-49; Hargrove testimony, Hargrove Exhibit No. 2; Mr. Thomas' testimony, Thomas Exhibit No. 1; Price testimony, FOBPC Exhibit No. 4, Tr. III at pp. 20-26; and various citizen witnesses of FOBPC; Tr. III at pp. 25-26; Liberty Gap witness Hyre testimony, L.G. Exhibit No. 16 generally and at p. 10; Staff witness Kellmeyer testimony, Staff Exhibit No. 3 at p. 6; Tr. II at p. 248; Tr. III at p. 25-26). On the contrary, the only record review as to property values indicated that property values continued to increase in counties where wind projects have been building or are planned. (Hyre testimony, L.G. Exhibit No. 16 at pp. 3-9).

28. Based upon surveys conducted by others, reports from persons viewing the Mountaineer Project in Tucker County, and internet research, wind farms have little effect on tourism and property values. (L.G. Ex. No. 2 at p. 5; L.G. Ex. No. 13 at p. 4, Tr. II at p. 93, 95). Wind projects may result in an increase in tourism. (L.G. Ex. No. 13 at p. 4; Tr. II at p. 93). There is no credible evidence that quantifies or supports a finding of negative factor with respect to tourism impacts from wind turbine projects generally, or for the Project specifically.

#### Hydrology Evidence

29. The evidence as to the Project's potential impact on hydrology was conflicting (Sherlock testimony, L.G. Exhibit No. 11 at pp. 4-11; Tr. IV at pp. 113-45; Fleming testimony, FOBPC Exhibit Nos. 78-79; report pp. 8-10) but prior to commencing construction, Liberty Gap will be required to obtain a general storm water permit from WVDEP, and to do so Liberty Gap would be required to submit a Storm Water Pollution Prevention Plan. (L.G. Exhibit No. 11 at pp. 14-16).

### Cultural Issues

30. Liberty Gap hired CRAI initially to do preliminary work, including helping Liberty Gap understand its cultural resource needs. (L.G. Exhibit No. 21 at p. 2; Tr. II. at p. 57). After Liberty Gap filed rebuttal testimony with the Commission on December 6, 2006, it hired CRAI to conduct archaeological studies and consult with SHPO. (Tr. II at p. 56-57). As of the hearing in April 2007, CRAI had still not completed the work of identifying historic properties and/or archeological sites that may be impacted by the Project. (L.G. Exhibit no. 21 at p. 2; Tr. II. at pp. 58-59).

31. CRAI had not identified culturally significant sites within a 5-mile radius of the Project when it filed rebuttal testimony. (Smith testimony, Tr. II at pp. 56-57). CRAI commenced a Phase I archeological survey after the filing of rebuttal testimony on December 6, 2006, and had not yet completed the study or filed it with SHPO. (Tr. II at p. 56 Peirce testimony, Tr. I at p. 106). At the hearing, the consultant could not discuss potential impacts to cultural resources or any proposed mitigation plans. (Tr. II at pp. 58-59).

32. The West Virginia Division of Culture and History first corresponded with Liberty Gap regarding the Project in December 2004 (Tr. I at pp. 103-04), but the next correspondence between Liberty Gap and SHPO was “fairly recently” when a Liberty Gap consultant sought to initiate the identification process of the historic resources within the area of potential impact of the Project. (Tr. I at p. 106). This contact occurred after December 6, 2006. (Tr. II. p. 56-57).

33. As of the date of the evidentiary hearing, neither the West Virginia Division of Culture and History, nor Liberty Gap could accurately detail the cultural, historical, or archeological resources within the 5-mile radius of the Project. (Pierce testimony, Tr. I at p. 106).

### Possible Noise from the Project

34. Moatstown is the nearest community to the Project on Jack Mountain, and the nearest home in Moatstown is slightly more than 2,000 feet from the nearest wind turbine in the Project. (Barnes testimony, Tr. III, p. 44). There are 20 to 30 homes in Moatstown. (Mr. Barnes’ testimony, Tr. III at p. 62).

35. Liberty Gap’s witness Barnes took preconstruction ambient sound measurements at four monitoring locations around the Project area over a one-week period in March 2006. Barnes identified noise sensitive receptors such as residences, churches and cemeteries. (L.G. Exhibit No. 7 at p. 4). Most of the four monitoring locations were near

homes or small groups of homes and seasonal hunting cabins and were located 4,390 feet to 9,830 feet from the nearest proposed turbine site. (L.G. Exhibit No. 7 at p. 4).

36. Wind turbines have “a modulation component that is a variation in loudness caused either by attenuation or Doppler shifting” and may result in a periodic swooshing sound reported by listeners. Modulation is a sound characteristic that draws people’s attention to a sound source. If ambient sound is not greater than modulated sound caused by turbines, people may be able to pick out the modulations in the ambient noise. (Mr. Barnes testimony, Tr. III at p. 54-56, L.G. Exhibit No. 12 at p. 13).

37. It is possible for the wind to exist on Jack Mountain while it is calm in Moatstown. Under those conditions, Moatstown residences may hear the turbines, and the noise might be noticeable if the residences were downwind. (Barnes testimony, Tr. III at pp. 66-67).

38. A home 2,000 feet away from the nearest turbine is more likely to perceive turbine noise than a home that is 4,000 feet away from the nearest turbine. (Barnes testimony, Tr. III. At pp. 71-72).

#### Government Concerns with Endangered Bat Species

39. The WVDNR wrote to Liberty Gap’s consultant regarding the presence of rare and endangered species of bats near the project site (WVDNR letter dated December 6, 2005 to ECT, L.G. Exh. No. 20, PS No. 4).

40. USFWS wrote to Liberty Gap’s consultant in March 2006 regarding, among other things, the presence of rare and endangered bat species in the Project area and in that letter, USFWS advised Liberty Gap about its responsibilities under the Endangered Species Act and urged Liberty Gap to conduct expert studies as to temporary and spatial use of the project by bats as well and other research. (USFWS letter dated March 7, 2006 to ECT, L.G. Exh. No. 20, PS No. 4).

41. USFWS wrote to Mr. Matthews of Liberty Gap in March 7, 2006, stating concerns about the proximity of endangered bat species to the Project site and strongly recommending further coordination with regard to the Endangered Species Act. (USFWS letter dated March 7, 2006, to Mr. Matthews at p. 2, 10; Staff Exh. No. 2).

42. USFWS wrote to Liberty Gap’s counsel in June 2006, indicating a high likelihood of use of the project area by endangered species and a reasonable certainty of bat mortality from operation of the Project. (USFWS letter to Applicant’s counsel dated June 30, 2006, Staff Exhibit 2).

43. USFWS wrote to Liberty Gap in September 2006, stating USFWS's conclusion that "the proposed project would have a reasonable certainty of resulting in take of species protected by the ESA", that "the risk of mortality of listed bats is significantly higher at the Liberty Gap site than at other studied sites in the eastern forest region", that "we conclude with reasonable certainty that during the operational life of the project, federally-listed species will be taken", that "the Service continues to recommend that Liberty Gap pursue a section 10 permit" and generally disagreeing with Liberty Gap's experts who concluded the project would have little impact on listed bats. (USFWS letter to Linda Bouvette, September 28, 2006, at pp. 1, 2, 7, 8; Staff Exh. No. 2; FOBPC Cross Exh. 1).

44. Turbines in the eastern United States have substantially higher rates of bat mortality than in other regions of the country (Roy testimony, L.G. Exhibit No. 3 at p. 3; Tyrell testimony, L.G. Exhibit No. 9 at p. 5; Reynolds testimony, L.G. Exhibit No. 8 at p. 3) and the Mountaineer wind farm in West Virginia has the highest recorded per turbine collision mortality rate in the world. (Reynolds testimony, Tr. III at p. 189; Tyrell testimony, *Id.* at 276, Kellmeyer testimony, Tr. 5 at p. 17).

45. Bat experts have theories but do not know why turbines cause higher mortality for bats than other avian species, or why bat mortality rates have been high at the wind farms in the eastern United States, including the wind farm in West Virginia. (Tyrell testimony, L.G. Exhibit No. 24 at pp. 3, 5-6 and Tr. III at p. 302; Reynolds testimony, L.G. Exhibit No. 8 at p. 3).

46. The bat experts in this proceeding provided conflicting opinions regarding whether the mortality rate experiences of Mountaineer and Meyersdale could be directly extrapolated to the Liberty Gap site as called for by USFWS. (Tyrell testimony, L.G. Exhibit No. 24 at pp. 3, 24; Reynolds testimony, L.G. Exhibit No. 23 at pp. 3-4, 9).

47. Liberty Gap decided to cooperate with USFWS regarding commencement of the HCP and ITP process in December 2006. (*See*, Liberty Gap Motion to Abstain from Considering Potential Impacts to Wildlife filed December 8, 2006; USFWS letter to Mr. Cookman dated December 4, 2006; Staff Exh. No. 2).

48. Although Liberty Gap initiated talks with USFWS, it had not, as of the date of the hearing, filed a HCP or ITP application, nor had Liberty Gap determined whether an implementing agreement would be appropriate. As of the hearing date, Liberty Gap had not made a commitment to complete the HCP/ITP process. (Tyrell testimony, Tr. III at 307).

49. Because of the Commission's increasing concern regarding the Project impact on endangered bats, the Commission, in its December 14, 2006 Order, required Liberty Gap to file bi-monthly progress reports as to its ITP/HCP progress. Those progress reports



describe talks and meetings, but not concrete action on an ITP application. (See, bi-monthly reports in case file filed January 16, 2007, March 15, 2007 and May 15, 2007).

#### Evidence Regarding View from Public Places

50. Each of Reddish Knob, Spruce Knob, Entrenchment Overlook on U.S. 250, Shenandoah Mountain, High Knob Tower, Confederate Prayer Service Site on U.S. 220, and the Shenandoah Mountain Overlook on U.S. 33, are State and/or National view sites that have possible vistas of the Project.

51. Reddish Knob is a well-known National Forest Service site, is part of the George Washington/Jefferson National Forest and is 11.8 miles from the Project site. (Mr. Friend's testimony, L.G. Exhibit No. 15 at pp. 4, 6-7; Mr. McNeely's testimony, FOBPC Exhibit No. 75, p. 1). All of the turbines will be visible from Reddish Knob on a clear day, although they will appear small from that viewpoint. (L.G. Exhibit No. 25, DF Exhibit No. 2).

52. The Spruce Knob Observation Tower is a National Forest facility and the highest point in West Virginia. It is a tourist attraction. The Tower is 13.6 miles from the Project Site. On a clear day, the white turbines will be noticeable against a green background when viewed from Spruce Knob. (Mr. Friend's testimony, L.G. Exhibit No. 15 at pp. 4, 6-7, L.G. Exhibit No. 25, DF Exhibit No. 3; Tr. IV at p. 80-84; Mr. McNeely's testimony, FOBPC Exhibit No. 75, p. 2; Tr. IV at p. 45).

53. Entrenchment Overlook on U.S. 250, Shenandoah Mountain is a National Forest Service site and is part of the George Washington-Jefferson National Forest, and the southern trailhead for the National Forest Service Shenandoah Mountain Trail. This site is located from approximately 11 miles to 15 miles from portions of the proposed Project site. Some of the Project could be seen from this site and the turbines would appear similar to how they would look from Reddish Knob because of the similar distance. (Mr. Llewellyn's testimony, L.G. Exhibit No. 17 at pp. 14-16; Mr. Friend's testimony, L.G. Exhibit No. 15 at pp. 8-11; Mr. McNeely's testimony, FOBPC Exhibit No. 76, p. 3).

54. The High Knob Tower is a historic former fire tower owned by the National Forest Service as part of the George Washington-Jefferson National Forest. Both the Shenandoah Mountain Trail and High Knob Trail are National Forest Service Trails on the west side of the Shenandoah Mountain. The Project is approximately 13 miles to 18 miles from High Knob Tower depending on the turbine. The turbines will be visible from High Knob Tower, but that distance would make them less apparent than they would be from the Spruce Knob Observation Tower. (Mr. Friend's testimony, L.G. Exhibit No. 15 at pp. 8-11; Mr. McNeely's testimony, FOBPC Exhibit No. 76, p. 4).

55. The Confederate Prayer Service Site on U.S. 220 is a historic site on U.S. 220 south of Franklin that is located approximately seven miles from the Project site. Given the proximity of this site to the Project, turbines could be seen and could be clearer to a viewer on a clear day than the view of turbines from Reddish Knob. (Mr. Llewellyn's testimony, L.G. Exhibit No. 17 at pp. 14-16; Mr. Friend's testimony, L.G. Exhibit No. 15 at pp. 8-11; Mr. McNeely's testimony, FOBPC Exhibit No. 76, p. 14).

56. The Shenandoah Mountain Overlook, U.S. 33 is an overlook from a West Virginia Department of Highways developed parking lot on top of Shenandoah Mountain and the northern trailhead for the National Forest Service's Shenandoah Mountain Trail, which is part of the George Washington-Jefferson National Forest. The site is located 13 to 18 miles away from the Project depending on the turbine. The turbines will appear in size similar to how they will appear at the Spruce Knob Observation Tower based on the distance. (Mr. Llewellyn's testimony, L.G. Exhibit No. 17 at pp. 14-16; Mr. Friend's testimony, L.G. Exhibit No. 15 at pp. 8-11; Mr. McNeely's testimony, FOBPC Exhibit No. 76, p. 17).

## **VI. CONCLUSIONS OF LAW**

1. Despite the lengthy and substantial efforts over 17 months to amend, supplement and otherwise modify the initially deficient Application, Liberty Gap has still failed to (i) file a materially complete Application pursuant to the Commission's *Siting Rules* or (ii) satisfy its evidentiary burden on several key issues that the Commission must analyze and balance under the statutory requirements of *W. Va. Code* § 24-2-11c and the Commission's *Siting Rules*.

2. Based on the testimony and exhibits in the record, there is sufficient evidence to support Liberty Gap's Application on the issues of the general information about Liberty Gap and the Project; the State and regional need for the Project; the economic and work force impact of the Project; the impact on wildlife, other than birds and bats; the impact on property values and tourism, and the impact on hydrology.

### **The 5-mile Map is Inadequate**

3. In its Application filed on December 7, 2005, Liberty Gap virtually ignored the requirements of *Siting Rule* 3.1 regarding the initial 5-mile map, and Liberty Gap's 5-mile map was inadequate.

4. The 5-mile map is core to the information for the Commission and others about the structures, entities, population centers and public and private assets that will or might be affected by the Project. It is central to any understanding of the scope of the Project at the outset of the review of the Application.

5. Liberty Gap's direct testimony filed simultaneously with its Application did not provide further elaboration of matters to be presented on the 5-mile map. Consequently, not only was the Application map inadequate, Liberty Gap's pre-filed direct testimony was inadequate regarding matters covered by the map. (Matthews' testimony, L.G. Exhibit No. 1 at pp. 19-20).

6. Liberty Gap's provision of a revised 5-mile map with rebuttal testimony did not meet the requirements of *Siting Rule* 3.1 nor did it provide other parties with a fair opportunity to review the issues raised by the required 5-mile map.

7. The Commission adopted *Siting Rule* 3.1.h.1 and requires pre-filed testimony in order to minimize discovery disputes and to facilitate the development of a record consistent with the procedural rights of other parties.

8. The filing of a basic United States Geological Survey map, without the provision of the required additional features and information required by the *Siting Rules*, is materially inadequate compliance with *Siting Rule* 3.1.h.1.

#### Lack of Sufficient Evidence on Cultural Issues

9. Liberty Gap's conclusory statement in its Application that it believed the Project would have no impact on historical or archaeological resources within Pendleton County fell short of compliance with *Siting Rule* 3.1.o. (L.G. Exhibit No. 10. at p. 120). By failing to provide anything in the Application or in the pre-filed testimony, (or at the hearing for that matter) about the cultural impact of the Project, Liberty Gap has submitted an inadequate Application.

10. Liberty Gap's suggestion that the deficiency in the Application may be cured by its promise to file the archaeological survey and comply with subsequent recommendation made by the West Virginia Division of Culture and History, manifests the patent absence of information in its Application and ignores the fact that the information was not included in pre-filed testimony or otherwise developed at hearing. Liberty Gap failed to provide minimal information on an issue that should have been addressed at the outset of this case and has not provided the public with sufficient information to review and understand the nature of the Project and its potential impact on the community around Jack Mountain.

#### Failure to Satisfy its Evidentiary Burden Regarding View From Public Places

11. *Siting Rule* 3.1.j.1 requires still renderings from scenic overlooks and project views evident to the public.

12. The likely visibility of wind projects constructed on mountain tops in this State (and the strong feelings and emotions this generates among the proponents and opponents of these projects) was a primary concern of the Commission in promulgating *Siting Rule* 3.1.j.1.

13. Given the number and extent of possible “project views” of the Project (approximately 50 wind turbines ranging in height from 330 to 426 feet spread along approximately seven miles of the top of Jack Mountain), Liberty Gap failed to comply with *Siting Rule* 3.1.j.1.

14. The Commission’s decision to refuse to issue a certificate for turbines in the close proximity of Dolly Sods in *NedPower Mount Storm, LLC*, Case No. 02-1189-E-CN, placed wind project applicants on notice of the level of interest and concern the Commission accords views of wind power projects from public access points.

15. While there may be some dispute about whether the Entrenchment Overlook on U.S. 250, the High Knob Tower, the Shenandoah Mountain Trail and High Knob Trail, the Confederate Prayer Service Site on U.S. 220, and the Shenandoah Mountain Overlook on U.S. 33 are “scenic overlooks” and project views that will be most evident to the public and which are accessible to the Applicant (*see Siting Rule* 3.1.j.1), the Commission believes they should have been considered in the Application (particularly in light of the few “views” selected by the Applicant).

16. The Application, as well as Liberty Gap’s pre-filed direct testimony, failed to adequately inform the Commission and the public of the impact on views that will be most evident to the public and that are accessible to Liberty Gap. (L.G. Exhibit No. 10; L.G. Exhibit No. 15).

The Failure to Address Certain Issues Fully Impacts  
the Ability to Balance the Interests

17. Despite the attempts by Liberty Gap to strengthen its case following other parties’ motions to dismiss filed early on in this proceeding, Liberty Gap did not meet its burden of proof on cultural issues; nor does the Commission believe that Liberty Gap carried its burden of proof with respect to evidence about possible noise impact and intrusion from the Project.

18. The lack of adequate evidence on the significant issues of noise and cultural impact (coupled with the Commission’s continuing concern about endangered bat species) essentially eliminates the Commission’s ability to “balance the interests” in this case pursuant to *W. Va. Code* § 24-2-11c.

19. The position of the USFWS and WVDNR on endangered bat species and, in particular, the unsettled state of the HCP and ITP process affects the Commission's ability to balance the interests in this case.

#### Liberty Gap's Interest in the Project

20. Liberty Gap adequately demonstrated its interest in developing the proposed Project. (L.G. Exhibit No. 14 at p. 32-34).

#### State and Regional Need for the Project has been Shown

21. Liberty Gap has presented evidence that ECAR has a need for additional generation (Mr. Matthews' testimony, L.G. Exhibit No. 1 at pp. 4-6), and that this project could meet needs throughout the region.

22. *EPA 2005* amended certain sections of the *United States Code* to encourage the use and development of renewable energy resources. (See Title II of P.L. 109-58).

23. The Commission's policy is consistent with *EPA 2005* and promotes utility access to diversified energy sources such as wind.

24. No West Virginia statutes or legislation suggest that wind turbines are an inappropriate source of new electric generation in this State.

25. The generation of electricity from the Project using a renewable wind resource to generate electricity for 35,000 customers is not inconsistent with State policy.

#### Substantial and Positive Economic and Work Force Impact

26. The Project will have a positive economic impact with respect to jobs, cost of construction, business volume, indirect business impact, and total output. (See, Child study, L.G. Exhibit no. 2; Jin study, C.T. Exhibit No. 1, and Clinch study, FOBPC Exhibit No. 1).

27. The Memorandum Agreement among U.S. Wind Force, LLC, Liberty Gap's parent company, and the North Central West Virginia State Building and Construction Trades Council and IBEW Local 596 and 17 other construction union locals is a significant economic value and ensures that workers used in the construction of the Liberty Gap Project will be local workers. (Mr. Snyder's testimony, C.T. Exhibit No. 2 at p. 2 and exhibit no.1).

28. The evidence provided by Construction Trades supports conclusions that the Project would create construction jobs and that the State and local economies would benefit from the proposed Project. (*Id.*)

No Serious Risk of Impact on Wildlife, Other Than Birds and Bats

29. The preponderance of the testimony and evidence indicates that the proposed Project would not pose a serious risk to legally protected species of plant or animal. (Poppleton testimony, L.G. Exhibit No. 4; L.G. Exhibit No. 18; Tr. III at pp. 112-22; Simpson testimony, L.G. Exhibit No. 5; L.G. Exhibit No. 20; Tr. III at pp. 162-64; Simmons testimony, FOBPC Exhibit No. 67; Tr. III at pp. 170-72).

No Credible Showing of an Adverse Impact of Turbines  
on the Value of Surrounding Property and on Tourism

30. Testimony that wind turbine projects negatively impact property values and tourism is inconclusive and unpersuasive and there was no probative evidence that quantified or supported a finding of a negative factor with respect to property value or tourism impacts from wind turbine projects. (*See generally* Hoy testimony, FOBPC Exhibit No. 3, Tr. II at pp. 248-49; Hargrove testimony, Hargrove Exhibit No. 2; Thomas' testimony, Thomas Exhibit No. 1; Price testimony, FOBPC Exhibit No. 4, Tr. III at pp. 20-26; and various citizen witnesses of FOBPC; Tr. III at p. 25-26).

31. In *Burch et al v. NedPower Mount Storm, LLC and Shell Windenergy, Inc.*, No. 33201 (W. Va. June 8, 2007), the Supreme Court of Appeals of West Virginia held that a private nuisance action asserting injury (turbine-created light effects and noise; dangers from broken blades, ice throws, and collapsing towers; and diminution of property values due to proximity to turbines) to individuals' private property rights, "are not among the primary factors to be considered by the PSC when making siting decisions, nor is it the statutory task of the PSC to apply nuisance law." (*Id.* slip opinion at p 14).

32. The Commission's focus on public interest is more concerned with view impact on public overlooks and noise impacts on communities collectively, than with the private citizen's subjective feelings about changes to his view from his property or what he will hear.

33. The Commission's concern with the protection of public places is evident from our decision in *NedPower*. (*NedPower Mount Storm, LLC*, Case No. 02-1189-E-CN, Commission Order entered April 2, 2003, Finding of Fact no. 237 at p. 99, and Conclusion of Law no. 12 at p. 102).

### Hydrology Evidence was Adequate

34. The more compelling evidence regarding hydrology is that the relatively small size of the nonpermeable portion of the Project will not negatively impact storm water run-off or karst systems. Furthermore, the storm water run-off concerns are alleviated by the fact that Liberty Gap will be required to obtain a general storm water permit from WVDEP, and to do so Liberty Gap will be required to submit a Storm Water Pollution Prevention Plan. (L.G. Exhibit No. 11 at pp. 14-16).

### Lack of Sufficient Evidence on Cultural Issues

35. Liberty Gap has the burden of establishing a *prima facie* case regarding the Project's impact on cultural resources through its Application and pre-filed testimony. (*See, e.g., Siting Rule 3.1.o*). Liberty Gap's attempts to cure its early neglect were belated and incomplete as of the hearing date and were prejudicial to the procedural rights of the other parties.

36. The potential for granting a siting certificate conditioned on an applicant's subsequent compliance with SHPO requirements does not relieve an applicant from compliance with the Commission's *Siting Rules* requiring information related to the potential impacts and mitigation plans regarding cultural resources.

37. Because the record in this proceeding is virtually devoid of evidence on this issue, the Commission is unable to conclude whether the Jack Mountain area may have significant cultural, historical or archeological resources that might be impacted by the Project.

38. Liberty Gap failed to meet its burden with respect to cultural disclosures or impact mitigation. There is no evidence in the record on this matter other than the extremely late effort by Liberty Gap to approach CRAI to undertake the archaeological study. (Application, L.G. Exhibit No. 10; Tr. II, pp. 56-59).

### Insufficient and Conflicting Noise Evidence

39. Because of the lack of evidence as to the level of ambient noise at Moatstown, the Commission is unable to assess adequately whether noise from the Project will be disturbing to persons residing in the 20 to 30 homes in Moatstown. (L.G. Exhibit No. 7; Tr. III at pp. 64-67, 71-72).

40. Liberty Gap's focus on project noise impact at 4,000 feet from the nearest turbine (the nearest ambient noise monitor was located at 4,390 feet), when the nearest

Moatstown sensitive noise receptor is located a little over 2,000 feet from the nearest turbine and there are 20 to 30 homes around Moatstown causes the Commission to question the predictability of noise impact of the Project on Moatstown.

41. Liberty Gap did not satisfy its evidentiary burden with respect to noise impacts.

#### Government Concerns with Endangered Bat Species

42. The Commission's primary concern with the presentation in this case about the impact of the Project bats is that Liberty Gap is not further along in its efforts to obtain an ITP for endangered species of bats.

43. Liberty Gap's delay in filing, followed by its reluctance to commit to the HCP and ITP process, in the face of USFWS concern about the danger to endangered species of bats is troubling. Given the circumstances of the Jack Mountain site, Liberty Gap should have made greater efforts to apply for the ITP earlier and filed the ITP as a part of the processing of the Application. The Commission, at this point, should be informed as to the final position of the USFWS on the threat to the Virginia Big-Eared Bat and the Indiana Bat.

44. The government concern regarding potential Project impacts on endangered bats causes complexity in any balancing of interests and gives rise to Commission concern about whether Liberty Gap's submission of evidence with respect to bat impacts, and the possible steps to ameliorate those impacts, standing alone, can be considered sufficient.

#### Failure to Satisfy its Evidentiary Burden Regarding View from Public Places

45. The Commission's concern regarding view from recognized public sites used as scenic overlooks is greater than its concern regarding individual views from private land.

46. Viewshed impact may be a significant issue for the following sites: Reddish Knob; Spruce Knob; Entrenchment Overlook on U.S. 250, Shenandoah Mountain; High Knob Tower; Confederate Prayer Service Site on U.S. 220; and the Shenandoah Mountain Overlook, U.S. 33, and Liberty Gap has failed to satisfy its burden to show that the Project will not significantly impact the public views of each to some degree.

47. The fact that there may be a view of a wind turbine from a public site does not make that site, *per se*, inappropriate for a wind power project, nor is the Commission holding that these views of the Project make the Project inappropriate. The Commission will make the decision of public view impact on a case-by-case basis.



48. The focus of our concern regarding the view from Spruce Knob, the highest point in West Virginia, is similar to our concern of the Dolly Sods viewshed in *Nedpower*. See Nedpower Mount Storm, LLC, Case No. 02-1189-E-CN.

Based on the Record the Commission Cannot Perform the Statutory Balancing Test

49. The Commission performs a two-part balancing test in order to fulfill its mandate under *W. Va. Code* § 24-2-11c(c) that the Commission “appraise and balance the interests of the public, the general interests of the State and local economy, and the interests of the applicant” in rendering a decision.

50. Within prongs (i) (ii) and (iii) of Part One of the balancing test, the Commission considers issues such as a Project’s impact on existing cultural features of a community, viewshed, noise, and non-listed and endangered bats.

51. As stated earlier in this Order, even if the Commission were to conclude that Liberty Gap’s Application met the requirements of the *Siting Rules* and proceeded with balancing the statutorily mandated interests in this case, the lack of, or inconclusive nature of, the evidence as presented at the hearing concerning community and environmental impacts does not allow the Commission meaningfully to assess prongs (i) (ii) and (iii) of the balancing test.

52. While the record contains sufficient information and testimony on prongs (a) and (b), and the economic gain portion of prong (c), (*see* Commission’s discussion of the issues for which satisfactory evidence is on the record, *supra* pp. 21-25), the record does not contain sufficient or timely information on all of the community and environmental impacts. For these reasons, the Commission does not believe that it can perform the balancing test based on the record before it in this case.

Future Applications and Evidence

53. The *Siting Rules* are in place to give the Commission, the public and other stakeholders a fair assessment of the Project in order to determine whether to oppose or support those projects. While subsequent testimony can certainly amplify and shape the process, the Application and the testimony filed therewith are extremely important, and the Application should comply with the requirements of the *Siting Rules*.

54. While some matters (NPDES permits and other post construction certification processes and permits) cannot be provided at the time of the filing (or for that matter at the

able to do so.

## **VII. ORDER**

IT IS THEREFORE ORDERED that the Commission refuses to issue a siting certificate to Liberty Gap for the Construction and Operation of a Wholesale Electric Generating Facility and Related Transmission Support Line of less than 200 kv and Associated Interconnection Facilities in Pendleton County, West Virginia.

IT IS FURTHER ORDERED that upon entry hereof, this case shall be removed from the Commission's open docket.

IT IS FURTHER ORDERED that the Commission's Executive Secretary shall serve a copy of this order on all parties of record by First Class United States Mail and upon Commission Staff by hand delivery.

Commissioner E. H. Staats is recused in this case.

A True Copy, Teste:

  
Sandra Squire  
Executive Secretary

JML/ljm  
051740cr.wpd