

PSC's surprise decision: What happened?

CHARLESTON, W.Va. — When the West Virginia Public Service Commission dismissed Liberty Gap's application for a wind utility this week, it followed a series of events in which the developer had refused access to its site, owned by Allegheny Wood Products. Here's what happened, as outlined by the PSC's order of dismissal:

■ June 15 — FOBPC attorney wanted an order in place to allow its consultants access to the project area for hydrology and geology inspection. Liberty Gap had to this point refused its request.

■ June 19 — Liberty Gap and FOBPC exchanged arguments on the matter. Liberty Gap argued that the property owner, Allegheny Wood Products, limits access to the site, and although Liberty Gap's lease agreement with the company allows it to invite third parties onto the property, it can only do so for purposes relevant to its lease agreement. Liberty Gap also said since it has no full-time employees, and would have to arrange for someone to provide access through the gates, ensure compliance with its lease, and secure the property afterward, that FOBPC should be required to reimburse the company for those costs.

■ June 21 — FOBPC argued that access to the site under the circumstances was routine but if the PSC were to accept the conditions imposed by Liberty Gap, access would be virtually impossible to gain and prohibitively expensive. Permitting only "friendly" studies, it argued, would not give the PSC a complete picture and make the intervenors' participation ineffective.

■ June 23 — The PSC issued its opinion that the issue should have been worked out without the need for the state agency to get involved. PSC staff had said, "Obviously, a party to a siting certificate case should have a right to make a field visit on a project site as part of the discovery process." The PSC said FOBPC would not be able to conduct invasive studies without a clear reason but that FOBPC had made it clear it didn't plan to. PSC staff agreed with FOBPC's assessment that Liberty Gap's actions "have caused unnecessary delay and do not appear to have a reasonable basis, and that Liberty Gap's lack of cooperation has made this case difficult to process." The agency granted FOBPC's motion requiring Liberty Gap to grant access to the site under the same terms it had used with the PSC's own staff.

■ July 3 — FOBPC filed a motion with the PSC

asking it to impose evidentiary sanctions on Liberty Gap for refusing to cooperate, noting that due to the developer's delays, its consultants were no longer reasonably available to make their inspections.

Liberty Gap had presented the group with a proposed written waiver of liability that included a waiver of any legal claims "caused by the gross negligence" of the group's inspectors. The group objected to the release, noting PSC staff had gotten access to the site without any such waiver. In addition, the group argued Liberty Gap "has exhibited a hostile attitude toward FOBPC as an 'unfriendly' visitor. This attitude has caused FOBPC to fear claims or suits by Liberty Gap against any visitors to the site. This attitude has victimized FOBPC ... (and) FOBPC has decided it will not expose its agents to this hostility."

Under the circumstances, FOBPC asked the PSC to impose sanctions such as prohibiting Liberty Gap from cross examining FOBPC.

■ July 5 — Liberty Gap responded to the group's motion saying it had complied with the PSC's order when it faxed a letter to FOBPC requesting dates it would like consultants to inspect. It had attached a draft release agreement and invited changes from the group's attorney. Liberty Gap argued the draft waiver did not create a hostile environment and said the group's request for limited cross examination was "contrary to the public interest and unduly restrictive to the commission's access to relevant information."

Ultimately, the PSC concluded Liberty Gap had effectively denied FOBPC access to the site by submitting a "patently unreasonable" draft waiver, and thereby "eliminated the possibility of full litigation of the issues in this case."

The PSC said even though the waiver from Liberty Gap was a draft, its inclusion of the term for the group's "own gross negligence" was not reasonable. "The commission can deduce no other motivation for the inclusion of such a release provision in the 'draft' other than as a strategy for further delay and frustration of FOBPC's access to the property," the agency said, and doing so only three weeks before the evidentiary hearings were to be held was "unacceptable."

Consequently, the PSC dismissed the application and cancelled the procedural schedule for the case, including the hearings that were to begin Aug. 9.