



CONSUMER ADVOCATE DIVISION
STATE OF WEST VIRGINIA
PUBLIC SERVICE COMMISSION
700 Union Building
723 Kanawha Boulevard, East
Charleston, West Virginia 25301
(304) 558-0526

December 13, 2017

Ingrid Ferrell
Executive Secretary
Public Service Commission of West Virginia
201 Brooks Street
Charleston, West Virginia 25301

04:50 PM DEC 13 2017 EXEC SEC DIV

RE: *Longview Power, LLC*
Case No. 17-1450-E-CS-PC

Dear Ms. Ferrell:

Enclosed for filing in the above-captioned proceeding are an original and twelve copies of *The Consumer Advocate Division's Motion for Reconsideration of Commission Order Granting Request by Monongahela Power Company and the Potomac Edison Company to Withdraw as Intervenors and/or Supplement to Its Motion to Intervene*, a copy of which has been served on all parties of record.

Very truly yours,

A handwritten signature in black ink that reads "Heather B. Osborn".

Heather B. Osborn
State Bar No. 9074

cc: Parties of record

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

LONGVIEW POWER, LLC

CASE NO. 17-1450-E-CS-PC

Application of Longview Power, LLC, for
waiver of material modification requirements or
for modification of siting certificate.

04:50 PM DEC 13 2017 EXEC SEC DIV

**THE CONSUMER ADVOCATE DIVISION'S
MOTION FOR RECONSIDERATION OF COMMISSION ORDER
GRANTING REQUEST BY MONONGAHELA POWER COMPANY
AND THE POTOMAC EDISON COMPANY
TO WITHDRAW AS INTERVENORS
AND/OR SUPPLEMENT TO ITS
MOTION TO INTERVENE**

Comes now the Consumer Advocate Division (“CAD”), pursuant to Rule 19.3 of the Public Service Commission of West Virginia’s *Rules of Practice and Procedure*, and hereby supplements its motion to intervene and/or requests that the Commission reconsider its Order of December 11, 2017, which granted the request by Monongahela Power Company (“Mon Power”) and The Potomac Edison Company (“PE”) (collectively “the utilities”) to withdraw as intervenors in this matter. The utilities claim that the Petitioner’s request causes harm to its customers, and on that basis claims further investigation of this claimed harm is warranted. Because utilities’ attorneys are governed by Rule 11 not to make frivolous claims to courts, the claimed harm to customers must be taken seriously.

The CAD questions the rationale for the utilities’ decision to withdraw from this case, as well as the genuineness of the utilities’ sudden support for Longview Power LLC’s (“Longview”) petition as filed with the Commission, and asks that the CAD and

Commission likewise be allowed to inquire as to the basis for believing customers are no longer going to be harmed. In that regard, a review of the procedural timeline of this case shows the following:

- Mon Power and PE moved to intervene on November 7, 2017. In their petition, the utilities made factual representations to this Commission regarding anticipated harm to the utilities *and their customers* should the Commission approve of Longview's application for waiver of material modification requirements or for modification of a siting certificate.
- The utilities served their first data requests upon Longview a few days later, on November 10, 2017.
- Thereafter, on November 13, 2017, Longview filed a Response to the utilities' Motion to Intervene, in which Longview opposed the motion.
- Longview responded to the utilities' first data requests on November 17, 2017.
- CAD moved to intervene in this matter on December 8, 2017, based on its statutory duty to represent the interests of customers of Mon Power and PE who may be adversely impacted if the Commission grants Longview's request. Previously, the CAD was unaware that the relief requested by Longview would harm customers, and when it became aware of this, the CAD immediately moved to intervene.
- Without addressing the CAD's Motion to Intervene, on December 11, 2017, Mon Power and PE requested leave to withdraw their intervention and further

requested that they be relieved of further participation in this case. The utilities further represented to the Commission that they now support Longview's application and "urge" the Commission to adopt it.

- No explanation for the utilities' sudden change of position accompanied the request for leave to withdraw.
- Also on December 11, 2017, within hours of the filing to withdraw, the Commission granted the utilities' request to withdraw their intervention in, and to be relieved from further participation in this case. That Order also canceled the hearing scheduled for December 18, 2017.

In their Petition to Intervene, Mon Power and PE made several factual representations to this Commission in support of their legal right to intervene including, *inter alia* (emphasis added throughout):

- "Mon Power built, operates, and owns its 1100 MW Fort Martin power station ("Ft. Martin") located along the Monongahela River in Madsville, WV. That plant has operated continuously since 1967 at its location serving retail West Virginia customers of Mon Power and PE for decades with low-cost, reliable generation. In 2004 and 2006, Longview proposed and chose to build its plant and related facilities only about 1 mile from Ft. Martin (directly across the Ft. Martin Road from the Ft. Martin power station) on land-locked property without direct access to the Monongahela River. *Ft. Martin is currently one of only two coal-fired generation stations owned by Mon Power, and its smooth*

and efficient operation is critical to West Virginia electric customers, the rates that they pay, and to the State of West Virginia.” Petition to Intervene at 1.

- “Longview’s proposed siting modification to change its present delivery of coal from the 4.5-mile conveyor belt to a new facility via a conversion of an existing MEPCO dock facility on the Monongahela River *will or may impact Mon Power and its Ft. Martin power station in several significant respects.* First, Mon Power currently uses that MEPCO dock facility for coal delivery from that dock to Ft. Martin’s coal barge unloading facility for a substantial amount of the coal burned at Ft. Martin. Now, Longview proposes a conversion to that dock. The Companies need to determine the change or impact a conversion of the dock will cause, the impact of another possible user of the dock facility, and to what extent and manner it would or may impact the Ft. Martin river barge operations by the proposed conversion. Ft. Martin receives all of its coal by barge, and this Longview proposed change in coal deliveries could adversely impact not only Ft. Martin’s coal deliveries from the MEPCO dock but for other barge coal deliveries as well.” *Id.* at 2.
- “Longview’s proposal to then truck the coal from the Mon River to its plant by an estimated 314 trucks per day causes additional concern for the Ft. Martin operations. The roads in the area are limited and congested. Since these Longview trucks would be expected to run during the daylight hours (7am-3

pm), that is approximately 40 trucks per hour, or one truck every 1.5 minutes along these existing roadways. The Companies are concerned, for themselves *and their ratepayers*, the logistical and cost impact such increased truck traffic will have on Ft. Martin operations, including the existing vehicular traffic in the area, the detrimental impact on employees and contractors who work at or for Ft. Martin, the effect on other businesses and *residents in the area*, and for safety in the area. Additionally, noise and dust from the increased vehicular flow could be a concern.” *Id.*

- “Mon Power is concerned with possible new or additional rules and regulations that road authorities may place on the roadways as a result of the proposed increased truck traffic due to any siting modification and, if it were to occur, the adverse impact on Ft. Martin operations and *its costs* resulting from any new rules and regulations.” *Id.*

Attorneys are bound to certain standards when making representations to this Commission. Specifically, an attorney is prohibited by the *Rules of Professional Conduct* from knowingly making false representations to a Court and other parties. Further, when presenting a pleading, motion or other filing to a Court, Rule 11 of the *West Virginia Rules of Civil Procedure* imposes a duty upon attorneys to ensure that factual contentions set forth in those pleadings have evidentiary support or that the attorney believes, in good faith, that those factual contentions are likely to have

evidentiary support after a reasonable opportunity for further investigation or discovery.

Specifically, Rule 11 provides, in its entirety, as follows:

Rule 11. Signing of pleadings, motions and other papers; representations to court; sanctions

1. **Signature.** — Every pleading, motion and other paper shall be signed by at least one attorney of record in the attorney's individual name, or if the party is not represented by an attorney shall be signed by the party. Each paper shall state the signer's address and phone number, if any, and The West Virginia State Bar identification number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.
2. **Representations to court.** — By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, and attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances,
 1. it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
 2. the claims, defenses, and other legal contentions therein are warranted by existing law or by a non frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
 3. the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
 4. the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
3. **Sanctions.** — If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions state below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

1. *How Initiated.* —

1. *By motion.* — A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.
2. *On court's initiative.* — On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.
2. *Nature of sanction; limitations.* — A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, and order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, and order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.
 1. Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).
 2. Monetary sanction may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.
3. *Order.* — When imposing sanction, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.
4. **Inapplicability to discovery.** — Subdivisions (a) through (c) of this rule do not apply to discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

Subsection (b) of Rule 11 is useful and instructive in this instance. Mon Power and PE, by their attorney, filed a Petition to Intervene in which the utilities represented to this Commission that Longview's proposed siting modification "will or may impact Mon Power and its Ft. Martin power station in several significant respects." The utilities, by counsel, then set forth for the Commission the specific adverse affects they believe the proposed modification of Longview's siting certificate will have upon the utilities and customers, stating, "they are concerned, for themselves and their ratepayers."

Pursuant to Rule 11, by filing the Petition to Intervene, counsel for Mon Power and PE certified to this Commission that to the best of the his knowledge, information, and belief formed after an inquiry reasonable under the circumstances, the Petition to Intervene (1) was not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims set forth therein were warranted by existing law (or by a non frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law); and (3) the allegations and other factual contentions set forth in the Petition to Intervene have evidentiary support (or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery).

In light of Mon Power and PE's counsel's implied certification to this Commission that the allegations and other factual contentions set forth in the Petition to Intervene have evidentiary support, and were not put forth with an improper purpose, the CAD believes it is reasonable to conduct an inquiry into the basis of the utilities' withdrawal of their

Petition to Intervene as it suggests there is no longer harm to ratepayers of Petitioner's relief is granted. If nothing else, the CAD is entitled to conduct its own inquiry into the potential harm to ratepayers of the requested relief. The intent of Rule 11 is surely thwarted where a party, by counsel, is permitted to make factual representations to the Court and other parties and then, without explanation, reverse course completely. If the factual representations set forth in the Petition to Intervene are not supported by the evidence then Mon Power and PE should be required to clarify its position by doing more than withdrawing from the case. On the other hand, if those factual representations were, in fact, supported by evidence or evidence that would be forthcoming through discovery, then Mon Power and PE should be required to explain the rationale for withdrawing from this case.

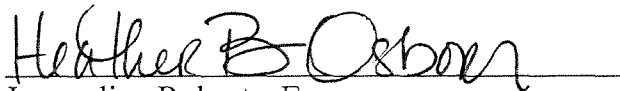
The CAD immediately petitioned to intervene in this case when it became aware that Longview's application herein, if approved, has the potential for adverse affects upon customers of Mon Power and PE. The CAD did not move to intervene prior to that time because, up until that point, the CAD understood that this case was one involving a merchant generator and was not privy to the concerns expressed by Mon Power and PE in their Petition to Intervene.

Further, as of the filing of this Motion, eight written protests have been filed with the Commission by members of the Ft. Martin community who object to Longview's proposed modification. These protests are consistent with the concerns expressed by Mon Power and PE in their Petition to Intervene. Despite the utilities' decision — for

unknown reasons – to no longer litigate those issues that they previously acknowledged could adversely affect their customers, the interests of Mon Power and PE’s customers must be represented by the CAD. Inasmuch as the interests of residential ratepayers are at stake, and those ratepayers may suffer harm from the utilities’ decision to now support Longview’s requested modification, the CAD must be permitted to inquire, through discovery, the basis for Mon Power and PE’s current position.

For the reasons set forth herein, the Consumer Advocate Division respectfully requests that the Commission grant the CAD’s *Motion for Reconsideration*, grant its motion to intervene and set a new procedural schedule for this case.

Respectfully,



Jacqueline Roberts, Esq.

WVSB No. 11756

Heather B. Osborn, Esq.

WVSB No. 9074

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CERTIFICATE OF SERVICE

I, Heather B. Osborn, counsel for the Consumer Advocate Division of the Public Service Commission of West Virginia, (CAD), certify that I have served a copy of *The Consumer Advocate Division's Motion for Reconsideration of Commission Order Granting Request by Monongahela Power Company and the Potomac Edison Company to Withdraw as Intervenors and/or Supplement to Its Motion to Intervene* upon all parties of record by First Class, U.S. Mail, postage pre-paid.


Heather B. Osborn
WV State Bar No. 9074

Dated: December 13, 2017