

No. 33201 *Jerome E. Burch, Levi Miller, Frank Fitzpatrick, Charles E. Thomas, Richard Fiedler, Robert F. Hurley, and John T. Mitchell v. NedPower Mount Storm, LLC and Shell Windenergy, Inc.*

FILED

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RORY L. PERRY II, CLERK

SUPREME COURT OF APPEALS

OF WEST VIRGINIA

Benjamin, Justice, dissenting:

The appellant landowners conceded, and the Court apparently agreed, that if appellee NedPower¹ were a public utility with the power of eminent domain, they could not have the construction and operation of its wind-turbine facilities enjoined as a private nuisance. Rather, they would be limited to a claim for money damages in an eminent domain or inverse condemnation proceeding² for noise, unsightliness, and any diminution in the

¹NedPower has been deemed to be an “exempt wholesale generator” (EWG), which, according to the P.S.C.’s order of April 2, 2003, is a status NedPower sought and received from the Federal Energy Regulatory Commission (FERC).

²Recently, this Court recognized the distinction between condemnation and inverse condemnation proceedings, noting that:

The United States Supreme Court drew the following distinction between “inverse condemnation” and condemnation proceedings in *U.S. v. Clarke*, 445 U.S. 253, 100 S.Ct, 1127, 63 L.Ed. 2d 373 (1980).

[A] landowner’s action to recover just compensation for a taking by physical intrusion has come to be referred to as “inverse” or “reverse” condemnation . . . [A] “condemnation” proceeding is commonly understood to be an action brought *by* a condemning authority such as the Government in the exercise of its power of eminent domain.

value of their property caused by the facilities.³

Id. at 255, 100 S.Ct. at 1129.

West Virginia Department of Transportation v. Dodson Mobile Home Sales and Services, Inc., 218 W. Va. 121, 123, n. 2, 624 S.E.2d 468, 470, n.2, (2005).

³In their briefs before this Court, the appellants represented that “[t]he sole issue on this appeal is whether a siting certificate from the Public Service Commission [PSC] forecloses a circuit court from considering whether a proposed industrial wind facility is a private nuisance when the wind facility is **NOT** a regulated public utility and has no power to condemn property.” (Emphasis in original). In support of this argument, appellants maintained that “[t]he wind-generated power in this case is not part of any regulated public utility” and claimed that orders of the PSC make it clear “that wind turbine facilities are not regulated public utilities” because NedPower, upon request, was granted a waiver by the PSC relieving NedPower of its obligation to file certain financial and cost-of-service information in support of its application for a certificate of convenience and necessity. (Emphasis in original). Appellants conceded that “a landowner cannot enjoin a real public utility [apparently meaning a public utility that is subject to the full range of regulation by the PSC under the provisions of Chapter 24 of the W. Va. Code with respect to its rates and practices] because [such] utility can condemn” and acknowledged this Court’s decision in *Sexton v. Public Service Commission*, 188 W. Va. 305, 423 S.E.2d 914 (1992), noting that when the PSC is regulating a “real public utility”, all related nuisance damages must be sought through an eminent domain proceeding or a damage suit in circuit court. (Emphasis in original). In their Reply Brief, Appellants argued that “[i]n *Sexton*, the reason that the circuit court could not award an injunction was not the exclusive jurisdiction of the PSC, but rather the fact that the offending sewer treatment plant was a public utility with the right of condemnation!” (Emphasis in original).

Unfortunately, the Majority opinion is not as clear as it could and should have been regarding appellant’s representations and concessions as to the impact of a determination that NedPower is a regulated or a “real” public utility with the power of eminent domain. That the Court agreed with the appellants’ representations and concessions is perhaps best indicated by its statements that “[i]n *Sexton*, this Court found that equitable relief was not available to enjoin the taking for a public use but that the private landowners could seek nuisance damages in an eminent domain proceeding. In contrast, the instant case does not involve the taking of private property for public use. Therefore, the appellants herein, unlike the plaintiffs in *Sexton*, do not have the right of eminent domain proceeding in which they can also seek nuisance damages.” Majority opinion, p. 16. This statement by the Majority is confusing. If the Majority means that this is not a condemnation case, it is correct; on the

The explicit or implicit assumptions of the appellants and apparently of the Majority in this appeal is that: (1) NedPower must be subject to the full range of regulation by the PSC as provided in Chapter 24 of the West Virginia Code with respect to its rates and practices in order to be classified as a “real” public utility; and (2) that only such “real” public utilities have the power of eminent domain under W. Va. Code § 54-1-2(a)(2)(2006).⁴ In my opinion, both of these premises are incorrect.

A. NedPower is a Public Utility

The appellees describe NedPower time and again as being an “EWG” and its PSC certificated wind-powered electric generating facilities as being an “EWG project.”⁵

other hand, if it means that the wind turbines are for private use, I disagree for the reasons explained herein.

⁴W. Va. Code § 54-1-2 (a)(2) (2006) provides, “The public uses for which private property may be taken or damaged are as follows: . . . (2) For the construction and maintenance of telegraph, telephone, electric light, heat and power plants, systems, lines transmission lines, conduits, stations (including branch, spur and service lines), when for public use[.]” This provision was previously codified at W. Va. § 54-1-2 (b) (1979) but was redesignated as W. Va. Code § 54-1-2 (a)(2) in 2006 without textual amendment.

⁵As noted in footnote 1, *supra*, the PSC’s April 2, 2003, order determined that NedPower had sought and received from the FERC the status of an EWG. In paragraphs 5 and 6 of its August 8, 2002, application to the PSC for a certificate of public convenience and necessity to construct and operate up to 200 wind-turbine generators, NedPower made the following representations:

5. Applicant will own and operate the Project as an exempt wholesale generator as defined in Section 32(a) of the Public Utility Holding Company Act of 1935. 15 U.S.C. § 79a, et seq.

EWG, the first letters of “exempt wholesale generator,” is derived from the Energy Policy Act adopted by Congress in 1992. According to *National Association of Regulatory Utility Commissioners v. Security & Exchange Commission*, 63 F.3d 1123 (D.C. Cir. 1995), the Energy Policy Act’s

purpose was to encourage “stead[y] increases [in] U.S. energy security in cost effective . . . ways” by “us[ing] the market rather than government regulation wherever possible both to advance energy security goals and to protect consumers.” In order to facilitate the development of a competitive market for wholesale electric power, Congress amended the [Public Utility Holding Company Act of 1935] to make it easier for holding companies to invest in an “exempt wholesale generator” or “EWG,” which is defined as

any person . . . exclusively in the business of owning or operating . . . all or part of one or more

As an EWG, Applicant will be engaged directly and exclusively in the business of owning and operating the Project and selling the electric energy generated by the Project at wholesale. Applicant’s application for EWG status was filed on June 2, 2002 and was approved by the Federal Energy Regulatory Commission (“FERC”) on July 23, 2002. The letter approving Applicant’s application is attached as exhibit 2.

6. Upon commercial operation, Applicant will use the Project to generate electric energy exclusively for sale at wholesale in the competitive wholesale market. Applicant will make no retail sales of electric energy from the Project, including without limitation sales to industrial or commercial customers, unless and until such sales are (i) permitted under West Virginia law and the Commission’s rules and regulations; and (ii) permitted for EWGs under federal law.

eligible facilities and selling electric energy at wholesale.

An “eligible facility” is in turn defined to mean a facility that is either “used for the generation of electric energy exclusively for sale at wholesale, or . . . used for the generation of electric energy and leased to one or more public utility companies. . . .” Because Congress viewed the [Public Utility Holding Company Act’s] limitations on corporate structures as “stifling [to] the growth of independent power,” the 1992 amendments exempted EWGs “from all provisions of [the Public Utility Holding Company Act].” The amendments also ease the restrictions on companies that wish to invest in EWGs.

National Assoc. of Reg. Commr’s, 63 F.3d at 1125 (internal citations omitted) (emphasis added.)

This is not the first time that an EWG has been before the Court, yet neither parties nor the Court made any reference to the earlier case, that of *Affiliated Construction Trades Council Foundation v. Public Service Commission of West Virginia*, 211 W. Va. 315, 565 S.E.2d 778 (2002). While there are a number of facets to that case, the most significant holding of the majority for purposes of this case was that Big Sandy, the corporation at issue therein, was, a public utility despite the fact that the PSC had decided that it was not. Big Sandy, like NedPower, intended to generate electricity solely for the wholesale market. The majority in *Affiliated Trades* disagreed with the PSC’s and Big Sandy’s contentions that Big Sandy was not a public utility, stating:

Big Sandy has represented that it will produce electricity which

which will be transmitted to AEP for eventual sale to the public. West Virginia Code § 24-2-1 specifically states that one engaged in the generation of electric power is subject to PSC jurisdiction, whether the service is provided “directly or through a distributing utility.” We note also that any entity “engaged in any business, whether herein enumerated or not, which is, or or shall hereafter be held to be, a public service” constitutes a public utility under West Virginia Code § 24-1-2, as quoted above. That is an inclusive definition. We conclude that electric generation and transmission facilities intended solely for the sale of electricity on the wholesale market are within the statutory definition of a public utility set forth in West Virginia Code § 24-2-1 whenever it appears that the electricity produced will, in the course of distribution, ultimately be sold to the public. Accordingly, we find that the PSC determination that Big Sandy is not a “public utility” was erroneous as a matter of law.

Affiliated Trades, 211 W. Va. at 322; 565 S.E.2d at 785 (footnote omitted) (emphasis added).

To the majority in *Affiliated Trades*, if the electricity generated by a facility will ultimately be sold to the public, the facility is a public utility. It was of no consequence to the majority that the “public” may be situate entirely out of State. Furthermore, the extent of the PSC’s regulation of the facility did not enter into the Court’s decision.

Thus, by operation of the *Affiliated Trades* case, upon receipt of its certificate of convenience and necessity from the PSC on April 2, 2003, NedPower became a public utility subject to the full jurisdiction of the PSC to regulate its service, practices and rates under the provisions of Chapter 24 of the West Virginia Code.

Some three months after the PSC order, specifically on July 1, 2003, legislation was enacted, which, in amending W. Va. Code § 24-2-1, converted NedPower's certificate of convenience and necessity (issued by the PSC on April 2, 2003), into a siting certificate for its EWGs and declared in effect, insofar as here relevant, that except for certain delineated continuing jurisdiction of the PSC over the certificate issued to it, NedPower's wind-power-driven electric generators would not "be subject to the jurisdiction of the [PSC] or to the provisions of [Chapter 24 of the West Virginia Code] with respect to such facilit[ies] except for the making or constructing of a material modification thereof as provided in subdivision (5) of this subsection [(c) of W. Va. Code 24-2-1]." *See* W. Va. Code 24-2-1(c)(1). Thus, according to the 2003 legislation, specifically W. Va. Code § 24-2-1(c)(1) and (2), and W. Va. Code § 24-2-11c(e), (f) and (h), an EWG is subject to the PSC's jurisdiction and regulation with respect to the siting of its electric generating facilities, the making or constructing of a material modification thereof after the siting has been certificated, and considering and resolving complaints relating to compliance with, and the enforcing of, the material terms and conditions of the PSC order issuing the siting certificate.

Significantly, the 2003 legislation did not nullify the majority's holding in *Affiliated Trades* that an EWG is a public utility, and, in my opinion, it did not implicitly do so. Rather, the legislation simply lessened the PSC's authority to regulate an EWG under the provisions of Chapter 24 of the West Virginia Code. Whether an entity such as NedPower, an EWG, is or is not a public utility is not determined by the extent of the PSC's

statutory authority to regulate it, but rather, as the Court held in *Affiliated Trades*, whether its sale of electricity in the wholesale market will, in the course of distribution, ultimately be sold to the public, regardless of where that public may be located.

It is therefore my opinion that NedPower is a public utility herein even though the Majority and the parties assumed that it is not.

B. NedPower Has the Power of Eminent Domain Irrespective of Whether It is or Is Not a Public Utility Fully Regulated by the P.S.C.

The parties not only assumed that NedPower is not a public utility, but further assumed that only a public utility which is fully regulated by the PSC (a “real” public utility as the appellants put it) has the power of eminent domain. In other words, the parties linked the power of eminent domain of an electric power generator to PSC regulation. It is not clear that this assumption is correct.

West Virginia Code § 54-1-2(a)(2) declares, in part, that “[t]he public uses for which private property may be taken or damaged are as follows: . . . For the construction and maintenance of . . . electric light, heat, and power plants, systems, lines, transmission lines, conduits, stations . . . when for public use.” These words are indifferent as to how the electric power plant is driven, whether by coal, natural gas, water or wind. In my view, a

wind-driven electric power plant is an “electric ... power plant[]” under the provisions of W. Va. Code § 54-1-2(a)(2), and eminent domain may be employed in the construction and maintenance thereof if the plant is “for public use.” An electric power plant may be “for public use” irrespective of the extent of its regulation by the PSC as indicated above. The majority in *Affiliated Trades* declared that Big Sandy was a public utility not because of the extent of its regulation by the PSC, but because it generates electricity for ultimate sale to the public. In *Preston County Light & Power Co. v. Renick*, 145 W. Va. 115, 126, 113 S.E.2d 378, 385 (1960), this Court stated that “[t]he term ‘public utility’ properly designates the owner or person in control of property devoted to the public use[.]” As NedPower’s wind-driven generators are ultimately for “for public use,” NedPower is a public utility.

That “public use,” as that term is used in W. Va. Code § 54-1-2(a)(2), is not linked to the extent of regulation by the PSC of the electric power generators is evidenced by the fact that the Legislature bestowed the power of eminent domain upon “electric power. . . companies, when for public use” in 1907, well before the Legislature created the PSC in 1913. The constitutionality of the 1907 legislation was upheld in *Pittsburg Hydro-Electric Co. v. Liston*, 70 W. Va. 83, 73 S.E. 86 (1911).

Accordingly, I am of the opinion that NedPower, with respect to its EWGs, possesses the power of eminent domain. The Court should, therefore, have denied the relief sought by the appellant landowners because, as the appellants conceded, if NedPower were

a public utility with the power of eminent domain they could not enjoin the construction and operation of its wind turbines as a private nuisance. Accordingly, I dissent.