No. 29989 - The Affiliated Construction Trades Foundation, a division of the West Virginia State Building and Construction Trades Council, AFL-CIO v. The Public Service Commission of West Virginia and Big Sandy Peaker Plant, LLC

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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OF WEST VIRGINIA

Maynard, Justice, concurring, in part, and dissenting, in part:

I wholeheartedly agree with and join in the separate opinion written by Chief Justice Davis. I would simply add that I fear this opinion will have a chilling effect on the future development of electric generating facilities in this State. By legislating that people or groups can wait until after a certificate of convenience and necessity is granted to object, in derogation of W.Va. Code § 24-2-11(a) (1983), I fear the majority opinion will cause power generating entities and investors to shy away from West Virginia.

In fact, the fallout from the majority opinion is already being felt. On June 15, 2002, the Herald-Dispatch, a newspaper published in Huntington, West Virginia, reported that "Panda Energy International has put on hold construction of the gas-fired power plant it wants to build at Culloden while it sorts out the impact of a state Supreme Court ruling." Jim Ross, *Culloden Power Plant Put on Hold*, The Herald-Dispatch, June 15, 2002, at 1A. The director of corporate communications for the company stated that the project cannot proceed until the company figures out the meaning of the majority ruling. The 1,000 megawatt power plant,

which was announced two years ago, would employ forty-six employees with an average salary of $50,000 and pay approximately $4,000,000 in real estate and personal property taxes with sixty-eight percent of the tax revenues flowing to the school system. The majority has impeded, if not stopped, the entire project.

The majority opinion disallows a stable approach to development and operation of these plants. The fact that a company survives the statutory thirty-day protest period and receives a certificate now means nothing. The finality that historically comes with being granted a certificate of convenience and necessity has been stripped away. In our everyday world, this means that it could now be difficult to assemble a workforce. The contractor will not be able to guarantee construction time or make an educated guess as to when ACT, or any other person or group, will complain under W.Va. Code §24-4-6 (1923) and shut down construction. No worker wants to be subject to this uncertainty. Certainly the biggest obstacle which must now be overcome is financing. In order for investors to even look at these projects, the company must be able to project the construction deadline and state with a reasonable amount of certainty when the product will be ready for sale. Once a company such as Big Sandy Peaker Plant has jumped through all the hoops, the statutory structure provides this finality and stability.

By allowing W.Va. Code § 24-4-6 to replace W.Va. Code § 24-2-11(a), the majority has usurped the authority of the Legislature and, in so doing, has removed the

statutory stability and finality under which these projects must function in order to be successful. I cannot join in this result. However, I agree that the issue as it applies to Big Sandy is moot. For these reasons, I join Chief Justice Davis' separate opinion and write separately to reiterate my belief that the majority opinion will needlessly have a devastating and debilitating effect on construction of power generating facilities in this State. I fear it has already cost Cabell County the Panda Energy project and has cost forty-six good-paying jobs and $4,000,000 in new tax revenues.