

**COMMONWEALTH OF KENTUCKY
BEFORE THE KENTUCKY STATE BOARD ON ELECTRIC
GENERATION AND TRANSMISSION SITING**

In the Matter of:

THE APPLICATION OF THOROUGHBRED)
GENERATING COMPANY, LLC FOR A) CASE NO.
MERCHANT POWER PLANT CONSTRUCTION) 2002-00150
CERTIFICATE IN MUHLENBERG COUNTY, KY)

MOTION TO DENY APPLICATION

Big Rivers Electric Corporation ("Big Rivers") moves the Kentucky State Board on Electric Generation and Transmission Siting (the "Board") to enter an order denying the Thoroughbred Generating Company, LLC ("Thoroughbred") application for a certificate to construct a merchant electric generating facility in Muhlenberg County, Kentucky (the "Application"). As explained in more detail below, the Application is deficient because it fails to summarize the efforts made by the applicant to locate the proposed facility on a site where existing electric generating facilities are located (KRS 278.706(2)(g)), and it fails to analyze the negative economic impact of the proposed facility on the affected region and the state (KRS 278.706(2)(i)).

**Thoroughbred's Application must comply
with the requirements of KRS 278.706**

Thoroughbred's proposed facility is a "merchant electric generating facility" that is subject to the jurisdiction of the Board. Thoroughbred concedes the elements of jurisdiction in its application.

As a person seeking to obtain a construction certificate from the Board to construct a merchant electric generating facility, Thoroughbred is required to comply with the statutory requirements for an application stated in KRS 278.706. The statute expressly states that Thoroughbred's application "shall" include the information listed in it. "Shall" is mandatory when used in a statute. KRS 446.010(29). In its brief existence, the Board has already denied one application because the applicant did not strictly comply with the requirements of KRS 278.706. *The Application of Kentucky Pioneer Energy, LLC, Case No 2002-00312, order dated April 16, 2003.*

Thoroughbred's Application is deficient because it does not state the information required by KRS 278.706(2)(g)

Thoroughbred is required by KRS 278.706(2)(g) to summarize in its application "the efforts made by the applicant to locate the proposed facility on a site where existing electric generating facilities are located" One of the criteria upon which the Board can grant or deny a construction certificate is "[w]hether the facility is proposed for a site upon which existing generating facilities . . . are currently located" KRS 278.710.

Thoroughbred states nothing in its application about its efforts, if any, to locate its proposed facility on a site where existing generating facilities are located, and instead asserts in two brief paragraphs in Section 9 of the Application that:

- It began spending money on permit applications approximately two years before passage of SB 257;

- Expensive permit applications that fixed the plant location were filed at least a year before passage of SB 257; and
- Relocating the plant now is “impracticable.”

Thoroughbred even seems to suggest that constructing its plant on the site of a former surface mine may be an acceptable substitute for constructing it on a site where existing generating facilities are located.

Thoroughbred misses the point. The General Assembly required that an application include a statement of the efforts made by the applicant to locate the proposed facility on a site where existing electric generating facilities are located. SB 257 does not allow an exemption from this requirement based upon “impracticability,” or amounts expended on the proposed site. The General Assembly had to understand that denial by the Board of any siting application would be inconvenient and economically painful for the applicant. And it is reasonable to assume that the members of the General Assembly were well acquainted with the Thoroughbred project during their deliberations.¹ As a matter of law, the General Assembly is presumed to say in a statute what it means and mean in a statute what it says. McDowell v. Jackson Energy RECC, 84 S.W.3d 71 (Ky., 2002), quoting from Connecticut National Bank v. Germain, 503 U.S. 249 (1992).

¹ On June 19, 2001, Governor Patton issued Executive Order 2001-771 in response, in part, to the number of proposed merchant generating projects. As directed in the Executive Order, the Kentucky Public Service Commission (“Commission”) undertook a study of issues related to the need for and development of new electric generating capacity in the Commonwealth in Administrative Case No. 387, in which Thoroughbred was a party. The Commission issued its 94-page order in that case on December 20, 2001, some three months before passage of SB 257.

Thoroughbred's Application is deficient because it does not state the information required by KRS 278.706(2)(j)

Thoroughbred likewise fails to analyze adequately the proposed facility's economic impact on the region in which it will be located and on the state as required by KRS 278.706(2)(j). The economic impact of the proposed facility on the affected region and the state is also one of the criteria on which the Board may grant or deny the application. KRS 278.710.

The deficiency in this instance is that Thoroughbred's application gives no analysis of adverse economic impacts from the construction and operation of the facility. Construction of a coal-fired electric generating station has both positive and negative economic impacts. When the Kentucky Public Service Commission reviews the application of a public utility for a certificate of public convenience and necessity to construct a power plant, it conducts an analysis of "the environmental impacts of the proposed facilities and requires any adverse impacts to be balanced against the community needs, industrial development, customer requirements, and the economics of the facilities." See December 20, 2001 order in Administrative Case No. 387, page 81-82. This examination is independent of any other agency's environmental permit application review. KRS 278.025(6).

The General Assembly clearly intended that the Board weigh the positive economic benefits of a merchant generating project against the negative implications of the project. Unless Thoroughbred provides an analysis of both sides of the issue, the Board has no competing information to balance, and cannot perform its duties.

Big Rivers is filing this motion before it receives Thoroughbred's responses to its data requests. But Thoroughbred's application reflects facts that may belie the one-sided, positive economic impacts Thoroughbred claims the project will bring to the region and the state. Negative economic impacts could flow, for example, from the consequences of Thoroughbred's air emissions, water discharges, and its planned combustion waste management and disposal methods. The application does not analyze any of the potential effects of the plant's discharges, instead, it simply lists the environmental permits and the limits contained in them.

The application does not analyze the economic implications of the plant's consumption of the Class I and Class II increment for purposes of new source review (NSR) under Kentucky air pollution control requirements. The plant will consume more than half of the available Class I increment, which could significantly impact future economic development in areas of the state within 100 kilometers of Mammoth Cave National Park. The area affected would include the Cities of Bowling Green, Elizabethtown, Central City, Russellville, Franklin, Glasgow, and Hodgenville.

Under Kentucky's air program, a finite limit is imposed on new air emissions in given areas. In areas designated as "attainment" for the criteria pollutants Nitrogen Oxides (NO_x), Sulfur Dioxide (SO₂), Carbon Monoxide (CO), Ozone, Lead, and Particulate Matter (PM), the program sets a fixed limit of cumulative emissions that may be emitted by new sources locating in the area. New sources wishing to locate in areas designated as "nonattainment" for the

criteria pollutants must secure reductions in emissions from existing sources in the area, usually at significant cost. Generally, then, new sources will have strong economic incentives to locate in attainment areas. Likewise, nonattainment areas have a strong incentive to reduce emissions by all sources in the areas, and are less attractive for new industrial growth.

In attainment areas, the cumulative impacts of new sources may not consume more than a fixed amount of Class I or Class II "increment." Once all of the increment is consumed, new sources cannot obtain air emission permits in the area unless an equivalent amount of offsetting emissions is obtained.

Therefore, Thoroughbred should be required to describe the short term and long term consequences that the emissions from its proposed facility will have on economic development in the area. Although the plant may provide some short-term benefits in terms of increased employment in Muhlenberg County, the long term adverse consequences to economic development caused by the plant must also be considered.

As an example of the types of negative economic consequences that are not discussed in the application, the Thoroughbred plant will consume virtually all of the available Class I increment under the 24-hour averaging period for Sulfur Dioxide. The available increment in Class I areas for purposes of the 24-hour averaging period is 5 ug/m^3 . In its February 28, 2001 application for a permit, Thoroughbred indicated that it alone will consume 2.042 ug/m^3 of the available increment, and that after construction, slightly more than 1 ug/m^3 will remain.

The estimate was subsequently revised upward based on modeling performed by

the National Park Service and Thoroughbred. In the most recent Statement of Basis for the permit, the Division for Air Quality states that out of a total of 5 ug/m³ available increment under the 24 hour standard, construction of the Thoroughbred plant will result in consumption of 4.37 ug/m³, leaving a total of 0.63 ug/m³ for use by all other sources locating within 100 kilometers of the Park. In other words, the Thoroughbred plant will consume eighty percent of the remaining Class I increment. If the plant is built, significant new industries locating in Bowling Green, Elizabethtown, Central City, Hodgenville, Russellville, Glasgow and Franklin will be required to significantly limit SO₂ emissions to protect visibility in the Park. The economic impact of this large consumption of available increment should have been analyzed by Thoroughbred in its Application.

Likewise, neither the application nor Thoroughbred's air emission permit documents contain any discussion of the potential effects of PM_{2.5} emissions from the plant. Such emissions could have very significant effects on increment consumption and on visibility analyses at Mammoth Cave National Park, as well as NAAQS attainment in Muhlenberg and surrounding counties. The economic impact of the plant's PM_{2.5} emissions should also be taken into account.

The Application must be denied.

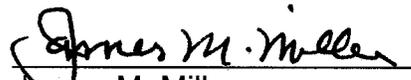
The Application is fatally incomplete because (i) it does not include a summary of the efforts made by Thoroughbred to locate the proposed facility on a site where existing electric generating facilities are located, and (ii) it does not contain an adequate analysis of the proposed facility's economic impact on the

region in which it will be located and on the state. The Board cannot carry out its duties in accordance with the applicable statutes if the Application fails to provide information required by those statutes. As the Kentucky Public Service Commission stated in its final order in Administrative Case No. 387 (page 84): “[S]iting electric generating and transmission facilities requires a delicate balance to ensure that local interests are adequately protected and to avoid adverse consequences to Kentucky’s utilities, their customers, and the public at large.”

Where an application to the Board for a certificate to construct a merchant generating facility fails to include information required by statute, it must be denied. *Kentucky Pioneer Energy*, April 16, 2003 order. The Application should be denied now, rather than after any evidentiary hearing,² so that a complete application will be before the Board and the public during any evidentiary hearing held in this matter.

WHEREFORE, Big Rivers respectfully requests that this Board enter its order denying the Application of Thoroughbred, and for all other proper relief.

September 2, 2003


James M. Miller
Bryan Reynolds
SULLIVAN, MOUNTJOY,
STAINBACK & MILLER, P.S.C.
100 St. Ann Street (42303)
P.O. Box 727
Owensboro, Ky 42303-0727
(270) 926-4000
COUNSEL FOR BIG RIVERS
ELECTRIC CORPORATION

² Big Rivers has today requested an evidentiary hearing in this case.