

**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	)

**REPLY TO THOROUGHBRED'S RESPONSE TO  
BIG RIVERS' MOTION TO DENY APPLICATION**

Big Rivers Electric Corporation ("Big Rivers"), by counsel, makes this reply to the Thoroughbred Generating Company, LLC ("Thoroughbred") response ("Response") to Big Rivers' motion that the Kentucky State Board on Electric Generation and Transmission Siting (the "Board") deny Thoroughbred's application.

**The Board has authority to deny  
Thoroughbred's application for incompleteness  
as requested by Big Rivers**

Thoroughbred erroneously represents in its Response that the Board "found" on August 5, 2003, that the Thoroughbred application met the minimum filing requirement set by its regulations (Response at p. 2), thus resolving any question of whether the application is complete. As Exhibit A to Thoroughbred's response shows, it was the Board staff, not the Board, which found the application "administratively complete." This is an important distinction.

The Board, as an administrative agency, acts only through its lawful orders. Union Light, Heat & Power Co. v. Public Service Commission, Ky. App., 271 S.W.2d 361, 365 (1954). And the Board has entered no order finding that

Thoroughbred's application is complete. The administrative staff's finding of "administrative completeness" is only a finding that the application, on its face, complies with the Board's administrative regulations. 807 KAR 5:110 § 3(4).

Thoroughbred contends that a motion to dismiss an application for incompleteness is premature before an evidentiary hearing is held, and that this position is supported by the Board's May 15, 2003 order in *The Application of Kentucky Pioneer Energy, LLC*, Case No 2002-00312 ("Order"). Big Rivers respectfully disagrees.

As the Board notes in *Kentucky Pioneer*, compliance with the statute specifying the contents of an application is a jurisdictional requirement. Order at 13. Without that compliance, the Board is "prohibited by law from reviewing" an applicant's application. *Id.* The failure to comply with one of the requirements of that statute cannot be compensated for by compliance with some of the decisional criteria in KRS 278.710. *Id.*

If the Board is prohibited by law from considering an incomplete application, a party to a Board proceeding may raise the issue of incompleteness by motion in advance of the evidentiary hearing, and the Board is authorized to grant that motion. And even if the finding of "completeness" had been made by the Board, the Board has the authority to reconsider or review its decisions. Western Kraft Paper Group v. NREPC, Ky. App., 632 S.W.2d 454, 455 (1981), citing Union Light, Heat & Power.

**The Board should deny Thoroughbred's incomplete application, without prejudice.**

Big Rivers' motion to deny Thoroughbred's application seeks to force Thoroughbred to complete its application before the evidentiary hearing is held. An evidentiary hearing is not required for the Board to determine that Thoroughbred's application (i) 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 (ii) fails to analyze the negative economic impact of the proposed facility on the affected region and the state (KRS 278.706(2)(i)). Finding an absence of information does not require the taking of evidence.

**Thoroughbred's application does not contain the information required by KRS 278.706(2)(g).**

Thoroughbred devotes several pages of its Response to the reasons why its proposed facility cannot, or should not be located on Big Rivers' Wilson Station site. Response at 6-10. This, it apparently believes, exempts it from the requirement of KRS 278.706(2)(g) that its application must summarize the efforts made by it to locate the proposed facility on a site where existing electric generating facilities are located. Thoroughbred further quips that it could have met the requirement of KRS 278.706(2)(g) by simply stating in its application that it "made no efforts to locate a proposed facility on an existing site." Response at 5.

But Thoroughbred's application neither summarizes its efforts to locate its proposed facility on an existing generating facility site, nor states that it made no such efforts. Its application is accordingly incomplete, and cannot be heard by the Board until it is complete. *Kentucky Pioneer Order* at 13.

**Thoroughbred's application does not contain the information required by KRS 278.706(2)(j).**

Thoroughbred contends that a statement of the positive economic aspects of a generating project satisfies the requirements of KRS 278.706(2)(j) that the application include "[a]n analysis of the proposed facility's economic impact on the affected region and state." Response at 13. It also asserts that the Board has no statutory authority to consider the economic impact on the region and the state of "the proposed facility's air emissions (including increment consumption), water discharges, [and] planned waste management and disposal methods." Response at 12.

But there are no exceptions to the economic analysis requirements for Thoroughbred's application (KRS 278.706(2)(j)), or the Board's economic analysis decisional criteria (KRS 278.710(1)(c)) to support this tortured and illogical construction of the Board's enabling statute. Nor does the permitting process before the Natural Resources and Environmental Protection Cabinet involve consideration of adverse economic impacts of a permittee's facility. Nothing in KRS 224.10-280 authorizes the Cabinet to consider anything more than the environmental impacts of a proposed merchant plant, even though serious, adverse economic impacts can flow from the Cabinet's legally correct

determinations.<sup>1</sup> Such considerations are outside the authority of the NREPC. The General Assembly has placed the authority to consider the economic consequences of a merchant plant, both negative and positive, in the Board. KRS 278.706(2)(j), KRS 278.710(1)(c).

Thoroughbred does not deny the existence of adverse economic impacts from its project. It simply takes the position that it is not required to tell the Board about them in its application. Big Rivers disagrees, and has moved to deny Thoroughbred's application until Thoroughbred discloses both sides of the economic impact story of its project.

### Conclusion

Big Rivers is a non-profit, rural electric cooperative. It has an obligation to learn whether the Thoroughbred project will have an adverse economic impact on it, and by extension, on its member distribution cooperatives' approximately 110,000 retail electric customers located in 22 counties in Western Kentucky.

Big Rivers does not object to Thoroughbred locating its generating plant on the proposed site so long as the project will not have adverse economic

---

<sup>1</sup> See Western Kraft Paper Group, *supra*, at 454. In that case, Kentucky Utilities filed an application with NREPC to consume all of the available increment in Hancock County at a proposed generating plant site. With respect to Western Kraft's plans to expand its paper mill in that county, the Court noted in deciding a procedural issue that "[t]he reservation of permissible increased levels of pollution is on a first come-first served basis. Therefore, **Western Kraft would not have any increment available to it if it wished to expand.**" (emphasis added).

consequences for Big Rivers and its members. Thoroughbred's incomplete application withholds information from Big Rivers that is important to Big Rivers' analysis of the Thoroughbred proposal. Unless and until Thoroughbred complies with the statutory requirements for the contents of the application, the application must be denied.

September 19, 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