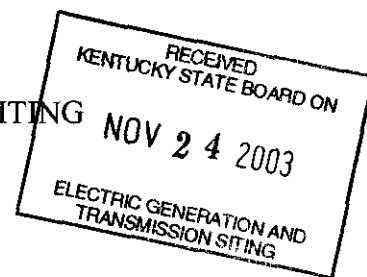


BEFORE THE KENTUCKY STATE BOARD
ON ELECTRIC GENERATION AND TRANSMISSION SITING
211 SOWER BOULEVARD
FRANKFORT, KENTUCKY 40601



In the Matter of:

THE APPLICATION OF THOROUGHBRED)
GENERATING COMPANY LLC FOR A)
MERCHANT POWER PLANT CONSTRUCTION) 2002-00150
CERTIFICATE IN MUHLENBERG COUNTY, KY)

POST-HEARING BRIEF OF INTERVENOR GARY WATROUS

Comes now the Intervenor, Gary Watrous (Watrous), by counsel and submits this Post-Hearing Brief concerning the application of Thoroughbred Generating Company, LLC (Thoroughbred) for a certificate of construction approval from the Kentucky State Board on Electric Generation and Transmission Siting (Siting Board).

INTRODUCTION

Intervenor Gary Watrous is a resident of Jefferson County, Kentucky who has been granted full intervenor status in this proceeding, and who both submitted direct testimony on the application of Thoroughbred for a siting certificate and was available for cross-examination by all parties on November 10, 2003.

Pursuant to the procedural schedule adopted at the conclusion of the November 10, 2003 hearing, Intervenor Watrous submits this post-hearing brief.

SUMMARY OF ARGUMENT

The application of Thoroughbred Generating Company, LLC for siting approval should be denied at this time for failure to comply with the requirements of Senate Bill 257 (KRS 278.700 et seq.), Kentucky's siting law. Specifically, the applicant has failed

to provide: (1) "an analysis of the proposed facility's economic impact on the affected region and the state"; (2) sufficient assurances that "any costs or expenses associated with upgrading the existing electricity transmission grid, as a result of the additional load caused by a merchant electric generating facility, shall be borne solely by the person constructing the merchant electric generating facility" as required by KRS 278.710(2); and (3) information concerning the construction, design, configuration and mitigation of transmission lines that to be constructed with the primary purpose of supporting the plant and connecting the power plant to the transmission grid; required because transmission lines associated with the particular plant fall within the definition of "associated facilities" within the meaning of "merchant electric generating facility" under KRS 278.700(2).

Assuming, *arguendo* that the application satisfied the above-cited statutory requirements concerning economic impacts, interconnection and upgrade costs, and transmission lines, the issuance of a construction certificate should be conditioned in order to assure both to protect ratepayers of BREC, KU and LG&E, and also to assure that the positive economic consequences for Muhlenberg County that were advanced in both public testimony and in the formal economic analysis as the justification for the facility, come to fruition. Binding conditions should be placed on any construction certificate to assure (1) that no costs of interconnection and network upgrades are borne by ratepayers; (2) that the proposed plant fuel supply is sourced from the designated reserves rather than reserves located outside of the county or region; and (3) that all construction and operational contracts include provisions requiring that all site

preparation, infrastructure, construction and operational jobs be first offered to qualified individuals and firms within Muhlenberg County and the western Kentucky region.

ARGUMENT

1. THE APPLICATION FAILS TO SATISFY THE ECONOMIC IMPACTS ANALYSIS REQUIREMENT OF KRS 278.706(2)(i)

Among the requirements for a completed application for a construction certificate for a merchant electric generating facility is that the applicant provide: "an analysis of the proposed facility's economic impact on the affected region and the state[.]" KRS 278.706(2)(i). The Siting Board determination on whether to issue or deny the construction certificate must be based on, among other factors, "[t]he economic impact of the facility upon the affected region and the state[.]" KRS 278.710(1)(c). It is axiomatic that if the economic impact analysis is insufficient in scope or substance, the application must be denied for want of compliance with the law, since the Siting Board would lack the information necessary to assess and weigh the economic impact under KRS 278.710(1).

The Thoroughbred application is woefully inadequate in the scope and substances of the economic analysis provided as part of the application, since the record evidence indicates that the facility *will* consume part of the air quality increment available to and necessary for major new industrial development in the western Kentucky region, yet the attendant costs to other existing or new facilities that might be imposed as a consequence of this increment consumption are unaddressed.

In the Thoroughbred application, the consideration of economic impact was limited to a touted "tremendous positive economic impact on the Central City/Muhlenberg County

area as well as a seventeen county region of western Kentucky." Thoroughbred Application, Attachment 6. That benefit was identified as coming from an average of 1,500 to a peak of 2,900 workers who "will most likely be residents of the western Kentucky area." Id. Additionally, the application represented that "[w]hen operational, the power plant and mine together will employ approximately 450 full time workers. It is anticipated that approximately 400 of these workers will reside in Kentucky." Id.¹

Missing from the Thoroughbred analysis is any justification for limiting the scope of the "affected region" to Muhlenberg County for purposes of determining whether the analysis satisfies KRS 278.706(2)(i); and missing also is any consideration of the nature, scope and severity of potential adverse economic consequences of the project to the region and state.²

Initially, it is unquestioned that the proposed coal-fired electric generating plant will consume part of the available "air quality increment" under the Clean Air Act's Prevention of Significant Deterioration (PSD) program. Thoroughbred acknowledged as much in its Response Of Thoroughbred To BREC's Motion To Deny Application, at p. 11, where it stated:

In this case, the Thoroughbred project has consumed part of the increment for SO₂, NO_x and PM₁₀ in Muhlenberg County and part of the SO₂ increment in Ohio County. *See Response to BREC Data Request No. 23*. Additional increment is available for other

¹ The projected positive impacts, it should be noted, are entirely dependent on factors that may not come to pass absent Board imposition of enforceable conditions: the sourcing of the plant from in-county coal reserves and the availability of the construction and operational jobs to county and area residents. Absent conditions on the construction certificate binding the applicant to representations made during this siting process, there is no binding assurance that the coal reserves identified will in fact be the source of the reserves for the proposed power plant; nor is there any enforceable commitment that construction and operational jobs will first be offered to qualified individuals in the county and region. The applicant should be bound to the commitments made, or the representations concerning local economic impact associated with direct employment at the plant and the proposed mine should be significantly discounted.

² Instead, the applicant limited the consideration of economic impacts to positive impacts to Muhlenberg and surrounding counties associated with temporary construction and permanent plant and mining jobs.

expansion in each instance. Finally, BREC makes it sound as if once increment is consumed, it can never be regained. However, the air quality regulations authorize re-evaluation of increment levels as a result of emission reductions at regulated sources.

Response Of Thoroughbred To BREC's Motion To Deny Application at 11.

While it is certainly correct that "[a]dditional increment is available for other expansion in each instance," what is left unaddressed is *how much* increment remains and the economic impact of the dedication of some of the available air quality increment to the Thoroughbred plant. Additionally, while Thoroughbred is correct that "the air quality regulations authorize re-evaluation of increment levels as a result of emission reductions at regulated sources," the point that Thoroughbred avoids is that the consumption of increment by this plant may *impose on other sources the obligation to make such reductions* in order to site in the affected region, thus imposing negative economic consequences.

The economic impacts associated with the increment consumption by the proposed plant, against the backdrop of available remaining air quality increments and the potential for chilling other economic development within the same air quality region, are precisely of the type and potential significance that the General Assembly contemplated would be analyzed in conjunction with the proposed facility. Throughout the new siting law, from the consideration of the "cumulative" environmental effects by the Natural Resources Cabinet to the requirement for mitigation in KRS 278.710 and against cost-imposition under KRS 278.212, the legislative concept is incorporated that new merchant plants *should carry their own weight* in environmental and economic terms. Absent a clear-headed assessment of the potential economic impact of dedication of this air quality increment on the siting and expansion of other major facilities, it is impossible for the

Siting Board to assess whether to issue the construction certificate in light of the facility's positive and adverse economic impacts.

Thoroughbred's expert witness, economist Dr. Glenn Meyers, was asked whether there "could be adverse economic impacts outside of Muhlenberg County" and in responded, noted that

[I]n the broadest of terms, to be sure, there are negative – and I state as much in my testimony. There are certain to be some negative . . . effects to any substantial investment project, and this is no exception, and there is certain to be negative environmental effects to some degree.

November 10, 2003 Transcript, p. 184.

Yet Dr. Meyers noted that his pre-filed testimony was limited in scope to Muhlenberg County, Id., pp. 187-8.

Dr. Meyers justified the lack of analysis or discussion of the negative economic impacts associated with negative environmental effects on two grounds. First, Dr. Meyers assumed that "such effects have already been factored into the development of the laws and regulations which govern these processes. That trade-off between adverse effects and beneficial effects has already been considered and reflected. So it wouldn't be appropriate on that basis, in my view, to readdress them in an economic impact study[.]"

While Intervenor would question whether the regulatory processes already incorporate and reflect the economic impacts of a particular project, it is clear that under this statute the applicant is required to account for and analyze those potential adverse effects on the region and state. The applicant cannot simply ignore the requirement of KRS 278.706(2)(i) that it provide in the application an analysis of the impacts of the particular project on the region and state, by claiming that any adverse economic impacts have

already been weighed by Congress or the legislature in enacting the general laws. If the applicant's claim is that the negative economic impacts have been elsewhere considered, it must supply that support in order that the full range of economic impacts, positive and negative, may be independently assessed by the Board.

The second reason for avoiding any discussion of adverse economic impact, according to Dr. Meyers, is that "if one goes from A to B to C, where A is the plant, B is the environmental effect, and C is the adverse economic effect, if B is not large, then the odds are C is not going to be large either." Transcript, p. 185.

With all due respect, the record is insufficient to support the conclusion that emission of thousands of tons per year of ozone precursors and other pollutants is "not large[.]" KRS 278.706(2)(i) requires more analysis than the conclusion, unsupported by any analysis or documentation, of "the odds" of adverse economic impacts to the region or state. On the record, the applicant has not provided any analysis of the potential adverse economic impacts (in terms of additional costs to or of *preclusion of* other expansions or new facilities in the region) to the affected region or state from the consumption of the air quality increments to support the proposed merchant electric generating facility, and on this basis the application must be rejected.

**2. THE THOROUGHBRED APPLICATION MUST BE DENIED OR
CONDITIONED ON PROVISION OF APPROPRIATE ASSURANCES THAT
ANY COSTS OR EXPENSES ASSOCIATED WITH UPGRADING THE
EXISTING GRID AS A RESULT OF THE ADDITIONAL LOAD CAUSED BY A
MERCHANT ELECTRIC GENERATING FACILITY BE BORNE SOLELY BY
THE FACILITY AND NOT BE INDIRECTLY BORNE BY RATEPAYERS.**

KRS 278.212 demands that "any costs or expenses associated with upgrading the existing electricity transmission grid, as a result of the additional load caused by a

merchant electric generating facility, shall be borne solely by the person constructing the merchant electric generating facility *and shall in no way be borne by the retail electric customers of the Commonwealth.*" (Emphasis added). As part of the construction certificate process, the applicant is required to "fully comply" with KRS 278.212, among other laws.

The Thoroughbred application failed to provide sufficient assurances to demonstrate that it will fully comply with KRS 278.212. In fact, the available evidence suggests that, absent the securing of a waiver from the Federal Energy Regulatory Commission Order No. 2003, the ratepayers for regulated utilities in the Commonwealth may be forced to bear, through refunds, some or all of the costs of system upgrades (including interconnections) needed to support the new merchant plant.

Intervenor Watrous supports both the analysis and conclusion of Kentucky Utilities Company in its response to the November 10, 2003 Data Requests, that

any certificate issued by the Board authorizing construction of the Facility must be conditions on KU's receipt of, and Thoroughbred's acceptance of, a FERC Order waiving the above-described refund/crediting rules or otherwise permitting Thoroughbred to assign back to KU any credits owed under Order No. 2003.

Response of Kentucky Utilities Company and Louisville Gas and Electric Company To Data Requests Proffered At November 10, 2003 Hearing, at p. 5.

Further, Intervenor Watrous concurs with the assessment of the potential adverse effects on BREC from the proposed interconnection and system upgrades, and supports the recommendation of BREC that, in order to protect the customers of BREC from subsidization of upgrades and interconnection costs associated with Thoroughbred, that Thoroughbred should be required to voluntarily waive any right to recover the costs of interconnections and system/network upgrades required to support the proposed merchant

plant, and that absent such a waiver, the certificate should be denied for want of a demonstration of compliance with KRS 278.212 and 278.210.

In response to the November 10, 2003 Data Request, Thoroughbred has indicated that it "will waive any rights or claims it might have to a case refund from BREC, LG&E and KU for such transmission credits."

While this concession would conceptually address *part* of the potential exposure of the ratepayers, any construction certificate must be conditioned, with respect to LGE and KU, on FERC approval of such an arrangement, since without FERC approval such a "waiver" might be superceded by federal law as being violative of the Supremacy Clause of the U.S. Constitution. With respect to BREC and its customers, an actual waiver executed and on file by authorized representatives of Thoroughbred and sufficient to assure that, with respect to interconnection costs and transmission credit refunds, the liability for payment of such costs with respect to ratepayers is extinguished.

3. THE APPLICATION LACKED INFORMATION NECESSARY FOR THE PUBLIC OR BOARD TO ASSESS THE IMPACTS OF THE CONSTRUCTION OF DEDICATED TRANSMISSION LINES INTENDED TO DISTRIBUTE THE ELECTRIC POWER GENERATED BY THE PLANT AND FOR THAT REASON THE APPLICATION SHOULD HAVE BEEN DEEMED INCOMPLETE PENDING SUBMITTAL AND REVIEW BY BOTH THE BOARD AND PUBLIC OF THAT INFORMATION

The Thoroughbred application did no provide detailed information concerning the construction, design, configuration and mitigation of transmission lines that would be constructed with the sole purpose of supporting the plant and connecting the power plant to the transmission grid.

Thoroughbred Generating Company LLC President Tickner acknowledged that the application did not request approval of the transmission line corridors, Transcript, at 49.

The failure to include information concerning the location, design, construction and proposed mitigation measures for all transmission lines to be constructed to interconnect the facility is fatal to the application. For while there exists a parallel statutory process for applications for construction an location of independent transmission line projects that are not associated with a particular merchant electric generating facility, KRS 278.700 requires that transmission lines supporting a particular merchant plant be reviewed by the Siting Board in conjunction with the power unit as "associated facilities" under the definition of "merchant electric generating facility" under KRS 278.700(2).

The application lacks any site assessment or other information concerning the proposed routing and the visual and other impacts to homeowners and property owners along the routes of the transmission lines that will be necessary to support interconnections between the proposed plant and existing grid. The ultimate ownership of the structures and lines is not determinative of whether they should be evaluated in conjunction with the generating plant itself, since the structure of the Act reflects a legislative intent that transmission lines constructed to support particular merchant plants and moving electrons from that plant onto the grid would be reviewed in conjunction with the siting review of the generating plant itself. The law defines a "merchant electric generating facility" is defined by the Act to include "associated facilities," and these lines are plainly associated with the generating facility and exist solely to support that plant's interconnection with the grid. Where the construction of new transmission lines are not associated with a particular merchant plant, under Section 8 of the Act an application for the transmission siting approval is required as a stand-alone application.

. The necessity of including in the site assessment the impacts of routing, design and configuration of transmission lines and structures rests on the intended purpose of the facilities – they are "associated" with the merchant power generating unit because their sole purpose primarily to move electrons from the merchant generation plant onto the grid. A reading of the law that would allow the applicant to sidestep Board consideration of the new transmission lines because they may be built by or ultimately owned or maintained by another entity, would substantially weaken the law, depriving the public of reasonable notice and a meaningful opportunity to be heard concerning siting of those support facilities, since as a practical matter once the facility siting is approved the corridor siting options and alternatives are significantly predetermined.

The application should be denied without prejudice to resubmit the application *including* a site assessment report addressing the impacts of the transmission lines and corridors.

CONCLUSION

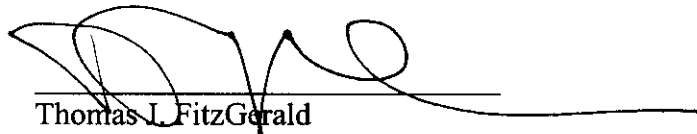
For the reasons stated herein, Intervenor Gary Watrous respectfully requests that the construction certificate be denied without prejudice for want of compliance with statutory requirements concerning the identification and evaluation of transmission lines to be associated with the facility, the economic impacts of the proposed facility on the affected region and state, and for failure to provide assurances that the costs of the facility will not be passed along to ratepayers of systems required to interconnect or carry the Thoroughbred load.

Alternatively, and without waiving objections concerning the insufficiency of the economic analysis and failure to provide analysis of the transmission line impacts, any construction certificate issued must include conditions:

(a) to provide assurances (through executed waivers and subsequent FERC approval of the waivers) that the costs associated with necessary interconnections and upgrades will be borne by the applicant without recourse to refunds; (b) to require that the claimed economic benefits to the local economy be assured by requiring that the proposed fuel supply for the plant be sourced from the identified Muhlenberg County reserves, that (c) to bind the applicant to the representations that any contracts executed by the applicant or on behalf of the applicant for the construction and operation of the plan jobs be first offered to qualified individuals and firms within the region.

Further, Intervenor requests any and all other relief to which he may appear entitled.

Respectfully submitted,



Thomas J. FitzGerald
Kentucky Resources Council, Inc.
P.O. Box 1070
Frankfort, Kentucky 40602-1070
(502) 875-2428
(502) 875-2845 fax

Counsel for Intervenor Pauline Stacy

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Intervenor was served this 24th day of November 2003 by first-class mail to:

Honorable Carl W. Breeding
Greenebaum Doll & McDonald PLLC
229 West Main Street, Suite 101
Frankfort, KY 40601-1847

Nick Schmitt
Milo Eldridge
Mactec Engineering & Consulting, Inc
13425 Eastpoint Centre Drive, Suite 122
Louisville, KY 40223

Honorable Rodney Kirtley
Judge/Executive
Muhlenberg County Courthouse
P.O. Box 137
Greenville, KY 42345

Hank List, Secretary
Natural Resources and Env. Prot. Cabinet
5th Floor, Capital Plaza Tower
500 Mero Street
Frankfort, KY 40601

Honorable James M. Miller
Sullivan, Mountjoy, Stainback
& Miller, PSC
100 St. Ann Street, P.O. Box 727
Owensboro, KY 42302-0727

David G. Rhoades, Chairman
Muhlenberg Joint City
County Planning Commission
203 North 2nd Street
Central City, KY 42330

Dianna Tickner, President
Thoroughbred Generating Company, LLC
701 Market Street, 6th Floor, Suite 781
St. Louis, MO 63101

J. R. Wilhite
Commissioner - Community Development
Economic Development Cabinet
2300 Capital Plaza Tower
500 Mero Street
Frankfort, KY 40601

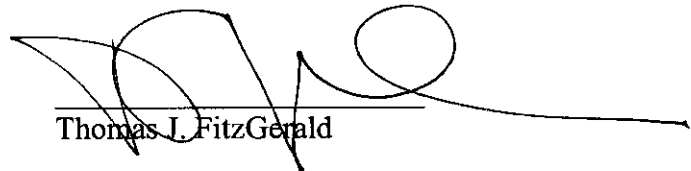
J. Scott Yaeger
Peabody Energy Company
701 Market Street, Suite 700
St. Louis, MO 63101-0000

Linda Portasik, Esq.
LG&E Energy Corp.
220 West Main Street
Louisville, KY 40202

Kendrick Riggs, Esq.
Ogden Newell and Welch, PLLC
500 West Jefferson Street Suite 1700
Louisville KY 40202

David Spainhoward, Vice President
Big Rivers Electric Corporation
201 Third Street, P.O. Box 24
Henderson, Kentucky 42420

and that the original and ten (10) copies were lodged, this 24th day of November, 2003,
with the offices of the Board, 211 Sower Boulevard, Frankfort, Kentucky 40601.



Thomas J. FitzGerald