

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

In the Matter of

THE APPLICATION OF ESTILL)	
COUNTY ENERGY PARTNERS, LLC,)	
FOR A CERTIFICATE TO CONSTRUCT)	CASE NO. 2002-00172
A COAL COMBUSTION/ELECTRIC)	
GENERATING FACILITY)	

RESPONSE OF ESTILL COUNTY ENERGY PARTNERS, LLC
OPPOSING MOTIONS TO INTERVENE AND TO
SCHEDULE AN EVIDENTIARY HEARING OF DLX,
INC. AND HARRY LAVIERS, JR., TRUSTEE

Estill County Energy Partners, LLC ("ECEP") hereby submits its response opposing the Motions To Intervene and To Schedule An Evidentiary Hearing (the "Motions") filed July 14, 2004 by DLX, Inc. ("DLX") and Harry LaViers, Jr. ("LaViers"), Trustee of a Trust established for the benefit of Donald G. LaViers, Stephen D. LaViers, Henry LaViers, IV and Elizabeth LaViers Owen, *et al* under the Will of Maxie LaViers, deceased (the "Trust"). For the reasons stated below, the Motions should be denied.

1. ECEP filed an application with the Board on June 14, 2004 ("Application") for a construction certificate authorizing ECEP to build a coal waste-fired, 110 MW merchant electric generating facility (the "Facility") on 28 acres of a site exceeding 500 acres in Estill County (the "Site"). Application, at 6. The Site is owned by Fox Trot Properties, LLC, an affiliate of ECEP, and will be leased to ECEP prior to the start of construction of the Facility. Application, at 7.

DLX and LaViers claim in the Motions that they own certain portions of the Site and demand that this Board not adjudicate certain real estate claims, which DLX is litigating against Fox Trot in a pending bankruptcy proceeding. Motions, at 3-10. Although they say they object to any determination of the real estate dispute in this proceeding, DLX and LaViers reserve the right to argue in this proceeding all of their real estate claims and defenses and state their intent to use ECEP's future responses to a Staff data request to "make the Board aware of additional points" with respect to the dispute.¹ Motions, at 8.

2. ECEP has not asked this Board to adjudicate, or even consider, DLX's real estate claims against Fox Trot, which are in litigation in federal Bankruptcy Court² or the claims of LaViers, who is not a party to the litigation. Indeed, it is clear that this Board, which was created by the Kentucky General Assembly solely to consider and act on applications for certificates authorizing construction of merchant generation plants and nonregulated electric transmission lines, has no jurisdiction to consider or adjudicate such claims to

¹ DLX and LaVier apparently hope that these responses, which presumably are those due by July 28, 2004, to the Staff data request dated July 9, 2004, will produce "information and maps relating to the issues that DLX and the Trust have raised herein." Motions, at 8.

² The issue was introduced in this proceeding not by ECEP, but by DLX and LaViers, ostensibly based on a notice dated May 18, 2004 ("Notice") sent by ECEP to DLX, which DLX and LaViers admit was received. Motions, at 2. As required by KRS 278.706(2)(c), ECEP sent by certified mail on May 18, 2004 to each landowner whose property adjoins the site the notice letters attached as Exhibit P to the Application. Application, at 11. These landowners were identified from the Estill County Property Value Assessment ("PVA") maps. Neither DLX nor LaViers is listed on the PVA maps as an owner of land adjoining the Site. Because of the pending DLX litigation against Fox Trot, ECEP also mailed the Notice to DLX to assure that DLX could not claim lack of notice as to this proceeding, but included the statement "It is the position of ECEP that DLX, Inc. is not a landowner entitled to the notice required by the above referenced statute and regulation." This was done to avoid any inferences from the Notice regarding DLX's real estate claims either in this proceeding or in the pending bankruptcy court litigation. The Notice to DLX, which was not filed with Exhibit P, did not introduce into this proceeding the real estate claims asserted in the Motions.

ownership of real estate.³ 2002 Ky. Acts ch. 365. Accordingly, ECEP requests the Board to confirm that it will not consider or adjudicate the merits of the real estate claims of DLX or the Trust described in the Motions. Granting this request, which also was made by DLX and LaViers in the Motions, would remove any legitimate concern of DLX and LaViers that their claims may be affected by this proceeding – the primary reason claimed by DLX and LaViers for their intervention.

3. DLX and LaViers also make vague and unsubstantiated claims that “some” of ECEP’s proposed construction and subsequent activities “may be too close to residential properties, such as at the Calla Subdivision or the Sand Hill property, see KRS § 278.700(6)”, “may also constitute a nuisance under Kentucky law” and “might constitute inverse condemnation.” Motions, at 8. None of these claims can be sustained as a basis for intervention. First, KRS 278.700(6) merely defines “residential neighborhood” and does not prescribe the setback requirements with respect to residential neighborhoods, which are

³ ECEP does not believe it is required to respond to each specific point in the Motions as if this were a court proceeding. However, if such a response would assist the Board: ECEP does not agree with the recitation of “Facts” on pages 2-10 of the Motions or the claim in Argument No. 1 on page 6 of the Motions that DLX and LaViers own what they refer to as the Adverse Tracts and Appurtenances but takes the position that those matters are outside the jurisdiction of this Board and should be excluded from consideration in this proceeding; as to Argument No. 2 on page 6 of the Motions, ECEP takes no position regarding the jurisdiction of the United States Bankruptcy Court; as to Argument No. 3 on pages 6-7 of the Motions, ECEP takes no position regarding the jurisdiction of the Kentucky courts, but denies that ECEP has claimed any land it does not own or that it has brought before this Board issues related to the real estate claims being litigated by DLX against Fox Trot; as to Argument No. 4 on page 7 of the Motions, ECEP takes no position as to whether the Kentucky Public Service Commission (“PSC”) and/or this Board possess the “powers allotted to the judiciary,” but agrees that neither the PSC nor this Board is authorized to consider or adjudicate the real estate claims of DLX and LaViers described in the Motions; as to Argument No. 6 on page 8 of the Motions, agrees that this Board is not a court and has no knowledge of any basis for alleged violations of the Constitutions of Kentucky and/or the United States claimed by DLX and LaViers but asserts that, even though DLX and LaViers are not shown as adjoining landowners on the PVA maps, they have received sufficient notice in accordance with due process to protect whatever rights they may have in this proceeding, as is clear from footnote 2 and from their timely filing of the Motions.

contained in KRS 278.704. The Application demonstrates that the Facility will comply with the setback requirements of KRS 278.704 applicable to residential neighborhoods (2,000 feet from the exhaust stack) and that the closest "residential neighborhood" is located 3,100 feet from the Facility. Application, at 9, 13 and Exhibit D. DLX and LaViers can add nothing to this determination. Second, the Motions provide no basis for any claims of "nuisance" or "inverse condemnation" with respect to the proposed Facility, and ECEP knows of none. In any event, as with the real estate claims made in the Motions, this Board would have no jurisdiction to consider or adjudicate any such claims, which would have to be brought in court. The Motions ask for relief that this Board does not have jurisdiction to grant.

4. DLX and further assert the right in this proceeding:

to see that ECEP complies with all existing federal, state and local laws and regulations, the common law and applicable equitable doctrines relating to the Application, the Power Plant and the Plant Property as the same may developed if the Certificate and the other licenses are granted and do not waive any such rights.

This Board is not a court in which federal, state and local laws or regulations or the common law and equitable doctrines, can be enforced. Nor is it responsible for issuing the permits ECEP is required to obtain from other governmental bodies or for enforcing the terms and conditions of those permits.⁴ Once again, DLX and LaViers seek relief the Board has no jurisdiction to grant.

5. Finally, DLX and LaVier request the Board to schedule an evidentiary hearing pursuant to 807 KAR 5:110 "to address all of the issues

⁴ Indeed, KRS 278.704(1) provides that construction certificates issued by this Board are conditioned upon the applicant obtaining such other permits and allows the applicant a period of time after a construction permit has been issued to obtain them.

relating to the matters outlined" in the Motions. Motions, at 1 and 10. It is unclear whether DLX and LaViers were unaware that the Board has scheduled a public hearing on the Application for cross-examination of witnesses on August 24, 2004, or whether they are requesting the Board to convene a separate hearing dedicated just to the matters raised in their Motions, in addition to the public hearing already scheduled. Either way, ECEP believes an additional public hearing would be duplicative of the scheduled hearing and an unnecessary waste of the Board's limited resources.

6. The Motions represent a transparent attempt by DLX and LaVier to use this proceeding to gain advantage in real estate litigation with ECEP's affiliate. The primary issue they give for their intervention – objection to their real estate dispute being considered or adjudicated in this proceeding – is easily dismissed because no one had even sought such consideration or adjudication and because this Board has no jurisdiction to perform or issue it. The Application shows that applicable setback requirements have been met, resolving any need for intervention on that issue. The remaining reasons given for intervention are theoretical, entirely unsupported and beyond the Board's jurisdiction to address in this proceeding even if they were credible. DLX and LaViers have shown no legitimate special interest to be protected by their intervention. Their participation would not assist the Board in reaching its decision on the Application and would unduly interrupt this proceeding by distracting the Commission from its statutory duty to address the issues that it does have jurisdiction to consider. For the

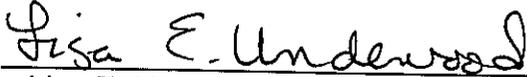
foregoing reasons, the Motions do not meet the applicable criteria for intervention and should be denied. See 807 KAR 5:110 Section (4).

7. If, despite the foregoing, the Board were to grant their requests to intervene, ECEP requests the Board to limit the participation of DLX and LaViers to the matters and issues that are relevant to the statutory criteria for consideration of the Application and within the Board's jurisdiction, as opposed to the extraneous and irrelevant matters raised in the Motions. ECEP also requests the Board not to schedule an additional public hearing that would be duplicative of the hearing scheduled for August 24, 2004.

WHEREFORE, ECEP requests the Board to issue an order denying the Motions or, in the alternative, granting the relief requested in Paragraph 7 of this Response.

Respectfully submitted,

ESTILL COUNTY ENERGY PARTNERS, LLC

BY: 
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Dated: July 20, 2004

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was sent by United States First Class Mail, sufficient postage prepaid, to the following this the 20th day of July, 2004.

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