

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

In the Matter of:

THE APPLICATION OF KENTUCKY)	
PIONEER ENERGY, LLC FOR A)	
CONSTRUCTION CERTIFICATE)	CASE NO. 2002-00312
PURSUANT TO KRS 278.704(1) TO)	
CONSTRUCT A MERCHANT)	
ELECTRIC GENERATING FACILITY)	

POST-HEARING BRIEF OF
KENTUCKY PIONEER ENERGY, LLC

* * * * *

Kentucky Pioneer Energy, LLC (“Kentucky Pioneer”), for its Post-Hearing Brief in this proceeding, states as follows:

The question presented in this proceeding has become whether the Kentucky State Board on Electric Generation and Transmission Siting (the “Board”) pursuant to KRS 278.700 *et seq.* (“the Siting Act”), should act on Kentucky Pioneer’s application by granting the requested Construction Certificate on the condition that the project “will meet all local planning and zoning requirements that existed on the date the application was filed.” KRS 278.701(1)(e). The Board has the express authority to consider “the efficacy of any proposed measures to mitigate adverse impacts that are identified” in connection with the “zoning” criteria¹ “from the construction or operation of the proposed facility.” KRS 278.710(1)(h). Kentucky Pioneer’s commitment to obtain the approval from the Winchester-Clark County Planning Commission and to have its Construction Certificate conditioned upon obtaining such approval is a reasonably effective

¹ KRS 278.701(1)(e).

measure to mitigate the present concerns over whether the citizens of Clark County will have any “local control” over the project.

Overview

The site for the Kentucky Pioneer facility is located in Clark County, Kentucky, on approximately 300 acres within the 3,120 acre J.K Smith Site on which East Kentucky Power Cooperative (“EKPC”) currently operates five natural gas combustion turbines, a natural gas field with four producing gas wells and two nonproducing gas wells. Although the J.K Smith site is zoned as “agricultural” by the Winchester-Clark County Planning Commission² (“Planning Commission”), its use as a power generation site by EKPC is specifically exempted from the Planning Commission’s requirements by KRS 100.324(1). The Kentucky Pioneer site comprises 300 acres located *entirely* within the 3,200 acre J.K. Smith site owned and operated by EKPC. (Transcript of Evidence (“T.E.”), pp. 26-27, 83-84). Kentucky Pioneer has not filed an application with the Planning Commission to request that the current “agricultural” zoning designation be changed to “heavy industrial”, but it has unconditionally committed to do so in due course following the receipt of the Siting Board’s certificate. (T.E., pp. 8, 12, 19, 22, 26-27, 28, 30-31, 47 and 53).

However, an intervenor, the press and the participants at the public hearing have urged the Board to require Kentucky Pioneer to file for and obtain the approval from the Planning Commission prior to acting on its application requesting a Construction Certificate for a 540 MW Integrated Gasification Combined Cycle (“IGCC”) electric generating plant. The principal

² The Winchester-Clark County Planning Commission is a joint city-county planning unit adopted in Article 1, Code of Ordinances, City of Winchester. The Planning Commission was established in accordance with and subject to the Kentucky Planning and Zoning Statutes of KRS Chapter 100.

reason for their opposition lies more with what is not at issue before the Siting Board than the issues before the Siting Board.

Kentucky Pioneer's project advances several important legislative policies of the General Assembly. The General Assembly has a clearly established policy of fostering and encouraging the use of Kentucky coal by utilities like EKPC and by facilities like Kentucky Pioneer. KRS 278.020(1) and 278.710(2). The Kentucky Pioneer project, because it uses high sulfur coal as a principal fuel for the generation of electricity, advances the General Assembly's policy of encouraging the use of Kentucky coal. The location of Kentucky Pioneer's proposed facility at the J.K. Smith power station is consistent with the General Assembly's policy of encouraging the location of such facilities at sites upon which existing generating facilities are currently located. KRS 278.710(1)(d). The feed to the IGCC electric generating plant will consist of coal and Refuse Derived Fuel ("RDF"). The use of RDF as part of the feedstock advances the General Assembly's goals of encouraging the use of RDF as a form of clean coal technology. KRS 224.01-010 (23).

At the heart of this controversy is the decision by the General Assembly that as a type of "recovered material," RDF is exempt from locality-level waste regulation under KRS Chapter 224, as are "recovered material processing facilities." See KRS 224.43-010 (6); KRS 224.01-010 (20-21), (23); KRS 226.40-305; KRS 224.40-315.³ Local dissatisfaction with this legislative

³ In 1991, the Kentucky legislature enacted sweeping waste management reform that embraced and balanced two policy goals: (1) developing an integrated, comprehensive, statewide waste management system to reduce waste levels at municipal dumps and encourage a regional approach to waste management; and (2), devolving a degree of control over waste management to localities. KRS 224.43-010 (1 – 4, 6). To achieve these goals the legislature called for the Cabinet to develop, review and triennially update a statewide waste management plan. KRS 224.43-310 (1 – 2). Although the statute finds that counties and waste management districts "are in the best position to make plans for municipal solid waste collection services," KRS 224.43-010 (6) (emphasis added), the General Assembly conspicuously gave the Cabinet power to review and approve or disapprove localities' solid waste management plans to ensure that the plans accorded with statute, Cabinet-promulgated regulations and "the statewide solid waste reduction and management plan[.]" KRS 224.10-105 (1 – 2) (emphasis added). Thus, while the General Assembly recognized the importance of localities' expertise in handling local trash collection and

policy is not a persuasive reason for the Board to emotionally interpret Kentucky Pioneer's arguments, to overlook Kentucky Pioneers' unqualified statement that it would "absolutely agree to abide by all the planning and zoning laws" if the Siting Board rejected Kentucky Pioneer's argument reconciling KRS 100.324 and 278.710, or to construe the Siting Act inconsistently with the express language of the statutes or the terms of the prior orders.⁴ However, to avoid any confusion, Kentucky Pioneer made it clear at the August 22, 2003 hearing again and again that its earlier argument was now withdrawn. (T.E., pp. 8, 21, 22).

I. Kentucky Pioneer's Application Is Complete

On November 26, 2002, Kentucky Pioneer filed an application with the Board pursuant to KRS 278.700 *et seq.*, requesting a Construction Certificate for a 540 MW IGCC electric generating plant located in the vicinity of Trapp, Clark County, Kentucky. In support of its application for a Construction Certificate, Kentucky Pioneer submitted the Final Environmental Impact Statement ("FEIS") prepared over 33 months by the U.S. Department of Energy as its

dumpsites, it gave the Cabinet overarching regulatory and supervisory control of waste management to ensure that state policy would prevail over local concerns.

Beginning in 1990, the General Assembly made the development and use of processed solid waste for energy a statutorily enshrined policy goal, directing the Cabinet to "promot[e], when feasible, . . . the production of energy from other resources such as solid waste." KRS 224.10-100 (28)(d). Subsequently, in 1991, the General Assembly created the definition of refuse-derived fuels (RDF) as part of the same sweeping waste management reform legislation discussed above. The General Assembly defined RDF as a subset of "recovered material," excepted from the definition of "waste," and described it as "a sized, processed fuel product derived from the extensive separation of municipal solid waste, which includes the extraction of recoverable materials for recycling . . ." KRS 224.01-010(23). As a type of "recovered material," RDF is exempt from locality-level waste regulation under KRS Chapter 224, as are "recovered material processing facilities." See KRS 224.43-010 (6); KRS 224.01-010 (20-21), (23); KRS 226.40-305; KRS 224.40-315. Therefore, in 1991 the General Assembly made the development and implementation of RDF technology a state policy priority in order to "meet essential human needs while maintaining the Kentucky economy at the highest feasible level." KRS 224.10-100(28).

⁴ Q. "If it turns out that you are subject to planning and zoning, would you agree to abide by all the planning and zoning laws that are there?"

A. "Absolutely."

Transcript of Evidence, pp. 131-132 (March 6, 2003)

Site Assessment Report pursuant to KRS 278.706(2)(l) and in accordance with KRS 278.708(3).

KRS 278.706(2)(d) requires a completed application to include the following:

A statement certifying that the proposed plant will be in compliance with all local ordinances and regulations concerning noise control with any planning and zoning ordinances. The statement shall also disclose set-back requirements established by the planning and zoning commission as provided under KRS 278.704(3).

In its application, Kentucky Pioneer specifically made the following certification:

The plant will be designed, installed, and operated in compliance with any local ordinances and regulations affecting planning, zoning, noise, and set-back.

There are no Set-Back requirements imposed by Clark County Planning and Zoning Commission.

See Kentucky Pioneer's Application, Tab No. 12. Following the submission of additional data, the Board correctly determined Kentucky Pioneer's application to be administratively complete on December 19, 2002.⁴

The reference in the statute requiring disclosure of "set-back requirements" refers to the statutory authority in KRS 278.704(3). That statute provides that set-back requirements may be established by the planning and zoning commission from a residential neighborhood, school, hospital, or nursing home facility. That portion of the law obviously has no application to Kentucky Pioneer's project because the site is located entirely within the J.K. Smith power station site. Thus, there are no neighborhoods, schools, hospitals, or nursing home facilities adjacent to Kentucky Pioneer's site because the 300 acres is completely within EKPC's larger tract which has a long-standing use as a power generation station. It cannot be reasonably argued that the Planning Commission will use the independent authority provided under 278.704(3) to establish set-back requirements to protect a residential neighborhood, school, hospital, or nursing home facility when these uses are not located on the 3,120-acre J. K. Smith

⁴ Kentucky State Board on Electric Generation and Transmission Siting Letter of December 19, 2002.

power station. Indeed, the nearest residence is approximately one mile from Kentucky Pioneer's proposed facility!⁶

For these reasons, KPE's certification meets the requirements of KRS 278.706(2)(d).

II. Kentucky Pioneer's Construction Certificate Should Be Granted

The uncontradicted evidence in the record demonstrates that Kentucky Pioneer's application satisfies the statutory criteria for a construction certificate. To allow for the orderly development of such projects, the Siting Act allows the applicant to first proceed and obtain the Construction Certificate and then obtain the other regulatory permits necessary for the construction and operation of electric generating facilities (e.g. air, wastewater, water withdrawal, and solid waste disposal permits from the Kentucky Cabinet for Natural Resources and Environmental Protection).⁷ The Board engaged two independent consulting firms to review and evaluate Kentucky Pioneer's application and the transmission issues associated therewith. On February 6, 2003, Jason Associates Corporation issued its report (the "Jason Report") recommending the Board approve Kentucky Pioneer's application for a Construction Certificate subject to certain conditions.⁸ On March 3, 2003, Commonwealth Associates, Inc. ("Commonwealth Associates") issued its report recommending approval subject to certain conditions.⁹

The application of the ten statutory criteria in KRS 278.710(1)(a) – (i) and (2) to the evidence contained in Kentucky Pioneer's application, the FEIS, the Jason Report, the

⁶ Final Environmental Impact Statement, Section 5.3.3 at page 5-6.

⁷ This statutory scheme is evidenced by the manner in which the General Assembly defined the period in which the Construction Certificate will remain valid. The statute clearly states that "[t]he construction certificate shall be valid for a period of two (2) years after the issuance date of the last permit required to be obtained from the Natural Resources and Environmental Protection Cabinet . . ." KRS 278.704(1). (Emphasis added).

⁸ Jason Associates Corporation, *Review and Evaluation of: A Site Assessment Report for Kentucky Pioneer Energy Case Number 2002-00312*, February 6, 2003.

⁹ Commonwealth Associates, Inc., *Transmission System Review, Kentucky Pioneer Energy Project Case No. 2002-00312*, March 3, 2003, Vol. 1.

Commonwealth Associates' Report and the two evidentiary hearings show Kentucky Pioneer should be awarded the requested Certificate of Construction. KRS 278.710(1)(a) – (i) and (2). Included in the ten criteria identified under the statute, the Board must consider whether the proposed facility will meet all local planning and zoning requirements.¹⁰ KRS 278.710(1)(e) provides, in pertinent part, as follows:

The Board shall, under majority vote, grant or deny a construction certificate, either in whole or in part, based on the following criteria: . . . whether the proposed facility will meet all local planning and zoning requirements that existed on the date the application was filed.

The statute thus allows the Board to consider whether Kentucky Pioneer will comply with local planning and zoning regulations, including the change in the use of the property, as part of the criteria for granting, either in whole or in part, the construction certificate. KPE has expressly and emphatically stated that it will comply with all applicable zoning laws.¹¹ At the hearing of March 6, 2003, Mr. Lockwood testified that Kentucky Pioneer will comply with applicable local zoning and planning ordinances.

Q. “If it turns out that you are subject to planning and zoning, would you agree to abide by all the planning and zoning laws that are there?”

A. “Absolutely.” (T.E. pp. 131-132).

Then, again, at the August 22, 2003 hearing, Mr. Musulin, testified, again and again, Kentucky Pioneer “will comply with all local planning and zoning requirements.” (T.E., pp. 8, 12, 19, 22, 26-27, 28, 30-31, 47 and 53). Clearly, these statements by the corporate officers of Kentucky Pioneer constitute sufficient evidence of “whether the proposed facility will meet all local planning and zoning requirements that existed on the date the application was filed.”

¹⁰ See KRS 278.710 (1) (e).

¹¹ Dwight Lockwood testimony from March 6, 2003 Siting Board Evidentiary Hearing; T.E. pp. 131-132; Testimony of Mike Musulin testimony from August 22, 2003 Hearing, T.E., pp.8, 12, 19, 22, 26-27, 28, 30-31, 47 and 53.

278.710(1)(e). As explained by Mr. Musulin during the course of the August 22, 2003 hearing, the correct and reasonable interpretation of the Siting Board legislation is that compliance is prospective. (T.E., pp. 26-27). It is important to note, contrary to the assertions made in this proceeding, that the statute does not state “*whether the proposed facility has met all local planning and zoning requirements that existed on the date the application was filed*” or “*whether the proposed facility presently meets all local planning and zoning requirements that existed on the date the application was filed*”. The statute expressly requires the Board to consider “*whether the proposed facility will meet all local planning and zoning requirements that existed on the date the application was filed*”, and this distinction cannot be ignored.

The argument that the statute requires Kentucky Pioneer to obtain the approval of the change in the use of the property prior to the Board’s decision in this proceeding is meritless. There is no dispute, as a matter of fact or law, that Kentucky Pioneer must request and obtain a change in the use of the property from agricultural to heavy industrial. The testimony of Mr. Blanton, Director of Planning and Community Development for the Winchester-Clark County Planning Commission, clearly demonstrates the existence of the “use” requirement as of the date the application was filed and the need of Kentucky Pioneer to apply for and obtain a change in the use of the property from “agricultural” to “heavy industrial.” (T.E., pp. 85-86, 87). Thus, just as there is no question that Kentucky Pioneer’s proposed project presently does not comply with existing regulations, there can be no reasonable doubt that Kentucky Pioneer’s proposed project will comply with the planning and zoning requirements in the future because it must or it cannot be constructed. (T.E., pp. 93-94).

There is also no reasonable question about whether the Board has an adequate record to evaluate whether Kentucky Pioneer’s proposed facility will meet all local planning and zoning

requirements that existed on the date the application was filed. This is so because the uncontradicted evidence in the record shows the complete planning and zoning requirements as of the date the application was filed. There is no debate over the existence of both the technical requirements of the “Heavy Industrial Use” provisions or the need to apply for a change in the current use of the property to “Heavy Industrial Use”. The Board cannot legally engage in the speculation, as the intervenor contends, about some unforeseeable binding element being imposed on the proposed change in the use of the property for at least two reasons: (1) the contention is merely speculation and not evidence of any meaningful probative value; and (2) to the extent that such a binding element is imposed, Kentucky Pioneer will comply with the requirement, or construction will not begin and the project will not be built. (T.E., pp. 93-94). To do otherwise would be to invest millions of dollars in a project that was being constructed in violation of Kentucky law. This would be an irresponsible result that simply would not occur. (T.E., pp. 29-30). The Board has a complete and adequate record to evaluate whether Kentucky Pioneer’s proposed facility will meet all local planning and zoning requirements that existed on the date the application was filed.

If the General Assembly had intended applicants before the Siting Board to obtain certification from the planning and zoning commissions of compliance with existing planning regulations, as argued during the hearing, the General Assembly’s legislation would have specifically prescribed such an independent certification. It does not because the General Assembly contemplated that the applicant would be afforded an opportunity to comply on a prospective basis with all of the local planning and zoning requirements that existed on the date the application was filed. Even the intervenor agrees that the express language of the Siting Board legislation is the best evidence of its intent and policy. (T.E., p. 70). The phrase “existed

on the date the application was filed” in KRS 278.710(1)(e) does not require the applicant for a construction certificate to first apply for and obtain the necessary approvals from the local planning and zoning commission. The phrase was added by the General Assembly to shield the merchant power plant developer from being subject to ever changing standards by the local planning commission while filing for a construction certificate with the Siting Board by fixing the applicable standards as those standards that exist on the date the application is filed with the Board. The Board should not now interpret this phrase to transform this protection into a sword against merchant power plant developers to require prior approval by local planning commissions before filing for a construction certificate. To construe the statute otherwise makes the phrase “existed on the date the application was filed” meaningless.

Nevertheless, counsel for an intervenor contended, through cross-examination, that somehow the findings required by KRS 100.213 in connection with any proposed map amendment make it impossible (1) for an applicant to either certify that it meets existing planning and zoning regulations, or (2) for the Board to grant a certificate without the knowledge of such findings. (T.E., pp. 87-90). This argument is misleading. KRS 100.213(1) provides as follows:

Before any map amendment is granted, the planning commission or the legislative body or fiscal court must find that the map amendment is in agreement with the adopted comprehensive plan, or, in the absence of such a finding, that (1) or more of the following apply and such findings shall be recorded in the minutes and records of the planning commission or legislative body or fiscal court:

- (a) That the existing zoning classification given to the property is inappropriate and that the proposed zoning classification is appropriate;

- (b) That there have been major changes of an economic, physical or social nature within the area involved which were not anticipated in the adopted comprehensive plan and which have substantially altered the basic character of such area.

In considering any proposed map amendment on the part of Kentucky Pioneer, the Planning Commission will acknowledge that the property in question is zoned "Agricultural", while at the same time being subject to the permissible use by EKPC at its J.K. Smith site as a power generation station. The Planning Commission will also be required to determine whether the proposed map amendment is in agreement with the adopted 1997 Winchester/Clark County Comprehensive Plan Update (the "Comprehensive Plan"), which serves to guide the future growth and development of that community. (A copy of the Comprehensive Plan is attached hereto as Exhibit 1). Chapter II of the Comprehensive Plan recognizes that the current major public/semi-public land uses in the unincorporated areas of Clark County include public utility companies, and Chapter IV, dealing with land use goals and objectives, notes that the Planning Commission should insure that "all land uses are developed in a manner compatible with surrounding land uses". (Comprehensive Plan, Chapter IV, Section I(B), p. 51). Chapter IV also sets forth the goal to "accommodate diversified industrial development that will assist in providing for a broad and stable economic base in keeping with the character of the area", which is accomplished through the location of "future industrial development where it will be most compatible with surrounding land uses, with the proper environmental controls...". (Comprehensive Plan, Chapter IV, Section III(D)(8), pp. 53-54). The development of the property as proposed by Kentucky Pioneer will certainly be in a manner consistent with the surrounding land use by EKPC, and that development will also be in "keeping with the character" of the EKPC site – while at the same time involving a "diversified industrial

development” through the use of high sulfur coal as a principal fuel for the generation of electricity which is compatible with the surrounding use by EKPC.¹²

Obviously, the map amendment that Kentucky Pioneer will propose will be in complete accordance with the goals and directives set forth in the Comprehensive Plan. Assuming for the sake of argument, however, that such a finding is not made, then the findings required in KRS 100.213(1), subparts 1(a) and (b), are equally self-evident based upon any objective and reasonable application of the facts. Pursuant to the requirements of KRS 100.213(1)(a), the existing Agricultural zoning classification given to the property is inappropriate, and a change to a Heavy Industrial use classification is appropriate, as verified by the testimony of Mr. Blanton. (T.E., pp. 85-86, 87). The J.K. Smith site has been owned and operated as a power plant location by EKPC for years. The use of the property for the generation of power through combustion turbines has existed for years. This is a “Brownfield” type of project. There is no suggestion that Kentucky Pioneer’s use of the property would be ultimately anything different than the current use by EKPC, making a change to a Heavy Industrial use classification clearly appropriate.¹³ Any findings to the contrary would be nothing less than an arbitrary and capricious action by the government.

¹² The Comprehensive Plan also requires that any future rural industrial land development should be made “with wise environmental, transportation and other planning considerations by the Planning Commission during the zone change...”. (Comprehensive Plan, Chapter V, p. 80). All of those concerns would be addressed and satisfied by Kentucky Pioneer in the zoning change/map amendment process.

¹³ KRS 100.213(1)(b) is not applicable in this situation because, although a zoning change would be required, there have not been any “major changes of an economic, physical or social nature within the area involved which were not anticipated in the adopted comprehensive plan and which have substantially altered the basic character of such area.” That is the case because, although the J.K Smith site is zoned “Agricultural” by the Planning Commission, its use as a power generation site by EKPC is specifically exempted from the Planning Commission’s requirements by KRS 100.324(1).

The testimony of Mr. Walters should be given little weight. Mr. Walters is not familiar with the specific requirements of the Siting Board law. (T.E., p. 60). Under cross-examination, he admitted he was not an expert, and acknowledged that he had not read the complete Siting Board law. (*Id.*). His testimony was offered as a concerned citizen of Clark County and not as an expert in the Siting Board law. (T.E., pp. 71-72). Indeed, under cross-examination, he agrees with Kentucky Pioneer that Kentucky Pioneer must comply with the local planning and zoning requirements, but disagrees on whether that compliance should occur before the Board issues the construction certificate. (T.E., p. 64). Indeed, Mr. Walters seemed to agree with Kentucky Pioneer's proposition that Kentucky Pioneer could not begin construction of the proposed project without first having obtained the approval of the Planning Commission. (T.E., p 69). Blanton verified this fact when he explained Kentucky Pioneer could not proceed with the construction of the project without the fulfillment of the planning and zoning requirements. (T.E., p. 93-94).

Contrary to the interpretation argued during the course of this proceeding, 278.710(1)(e) does not require the applicant to have obtained all approvals from the planning and zoning commission or to even have applied for such approvals in order to be granted a construction certificate. This is so because the same statute which requires the Board to "grant or deny a construction certificate, either in whole or in part, based upon . . . whether the proposed facility will meet all local planning and zoning requirements that existed on the date the application was filed" also requires the Board to consider "the efficacy of any proposed measures to mitigate adverse impacts from this same section from the construction or operation of the proposed facility." KRS 278.710(1)(h). Clearly, if the Board can consider the effectiveness, power or ability of any "proposed measures to mitigate adverse impacts" that are identified from

considering whether Kentucky Pioneer's facility will meet all local planning and zoning requirements that existed on the date the application was filed," the Siting Board does not need to required Kentucky Pioneer to obtained the approval of the planning and zoning commission prior to the Board's decision in this proceeding.

The Board should treat Kentucky Pioneer no differently than its only other applicant to date to receive an order. In the proceeding involving Kentucky Mountain Power, LLC, the Board granted the applicant's Construction Certificate subject to numerous conditions and a monitoring plan to oversee the fulfillment of the commitments by the applicant.¹⁴ The Board did so because it was "sensitive to the fact that many of [the applicant's] proposed plans and agreements have not yet been finalized." Order, p. 17. For this reason, the Board ordered the submission of an annual project impact report in order to "successfully mitigate any adverse impacts caused by the inherent uncertainty of the project." Order, p. 17. There is no good and valid reason why the Board should not treat Kentucky Pioneer in the same fashion and approve the Construction Certificate on the condition that Kentucky Pioneer will comply with all applicable planning and zoning regulations, including the change in the use of the property, and monitor that compliance through oversight and reporting requirements. This oversight would be in addition to the oversight and inspection by the Planning and Zoning Commission described by Mr. Blanton at the hearing. (T.E., p. 94). The fact that the Board was not required to consider the issue of the applicant's compliance with local zoning laws in rendering its decision in Case No. 2002-149 does not render the Board's exercise of its authority in that proceeding distinguishable from this proceeding. The absence of a zoning authority in Knott County is a distinction without a difference for purposes of prescribing effective mitigation measures in this

¹⁴ *In the Matter of: The Application of Kentucky Mountain Power, LLC/EnviroPower, LLC For A Plant Construction Certificate in Knott County, Kentucky Near Talcom*, Case No. 2002-149, Order (September 5, 2002).

proceeding; indeed, if a County has not created a planning unit/commission or adopted specific zoning regulations, the provisions of KRS Chapter 100 still control the land use regulation in that County. (See generally KRS 100.111, 100.273, 100.277, 100.281, 100.283, 100.287 and 100.291). The *Kentucky Mountain Power* Order demonstrates the Board has the authority to grant the Construction Certificate subject to a number of conditions. In this case, the Board should continue to do so by granting Kentucky Pioneer a Construction Certificate on the express condition that Kentucky Pioneer meet all local planning and zoning requirements that existed on the date the application was filed prior to beginning any construction of the proposed facility.

III. The Siting Board's Over-Emphasis On Compliance With Local Zoning Ordinances Is Misplaced And Contrary To Law

In its Order of April 16, 2003, the Board acknowledged that compliance with local zoning ordinances is only one of several criteria that must be considered in rendering an approval or denial of the application.¹⁵ The Order continued, however, to state that the enabling statute and the statute's legislative history demonstrates the General Assembly's intent to emphasize local zoning and planning in the Siting Board application proceeding.¹⁶ The Board's emphasis on this one criterion as dispositive of Kentucky Pioneer's entire application is misplaced and contrary to law.

The April 16, 2003 Order improperly considers compliance with local zoning ordinances as a dispositive factor. Settled principles of law regarding statutory construction require that: (1) courts give effect to legislative intent by the expressed language of the statute; (2) courts give statutory language its plain and ordinary meaning; and (3) courts refrain from speculating what

¹⁵ *Id.*

¹⁶ *Id.* pp. 11-13.

may have been intended by the legislature but was not expressed in the statute.¹⁷ Furthermore, it is well settled law in Kentucky that an administrative agency “may not add to or subtract from” the requirements of a statute.¹⁸ Contrary to the expressed language of the statute and established precedence, the April 16, 2003 Order improperly and incorrectly interprets KRS 278.710 to require compliance with local zoning ordinances as the dispositive requirement. The Order, in effect, interprets the statute as to establish a two tier set of criteria; a dispositive tier containing compliance with local zoning ordinances and a non dispositive tier containing the remaining nine criteria. The language of the statute does not support such an interpretation. KRS 278.710 states that “the board shall, by majority vote, grant or deny a construction certificate, either in whole or in part, based upon the following criteria . . .”¹⁹ Noticeably absent from the statute is any indication that one criteria is to be emphasized over the others. If the General Assembly had intended that satisfaction of one criterion was to be dispositive in Siting Board proceedings, such an unconditional requirement could easily have been included in the statutory language. Since the emphasis of one criteria over the others is absent from the statutory language, the emphasis imposed by the Order is an impermissible expansion of the statute and is contrary to law.

Conclusion

The Kentucky Pioneer IGCC project will be one of the first uses of this ultra clean coal technology in the United States as a wave of IGCC projects are built in response to high gas prices. It represents the opportunity to provide low cost power to Kentucky retail customers without the environment impact that is associated with a typical coal fired generating facility and

¹⁷ See McCracken Co. Fiscal Court v. Graves, Ky., 885 S.W.2d 307, 309 (1994); Commonwealth, Cabinet for Human Resources v. Jewish Healthcare Services, Inc., Ky. App., 932 S.W.2d 388, 390 (1994); and Coy v. Metropolitan property and Casualty, Ky. App., 920 S.W.2d 73, 74 (1995)

¹⁸ Union Light, Heat and Power Co. v. Public Service Commission, Ky., 271 S.W.2d 361 (1954); Public Service Commission v. Attorney General of Commonwealth, Ky. App., 860 S.W.2d 296 (1993).

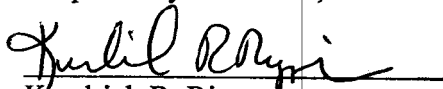
¹⁹ KRS 278.710 (1) (emphasis added).

without the associated financial risk. In order to implement this technology, Kentucky Pioneer has complied, and will continue to comply, with all applicable permitting and regulatory requirements necessary for the construction and operation of the IGCC facility. Further, Kentucky Pioneer has committed to implementing those mitigating factors identified by the FEIS and the Jason Report to reduce the impact of the facility to the local area.

The Kentucky Pioneer project, because it uses high sulfur coal as a principal fuel for the generation of electricity, advances the General Assembly's policy of encouraging the use of Kentucky coal. KRS 278.020(1) and 278.710(2). The location of Kentucky Pioneer's proposed facility at the J.K. Smith power station is also consistent with the General Assembly's policy of encouraging the location of such facilities at sites upon which existing generating facilities are currently located. KRS 278.710(1)(d).

Based upon the uncontroverted conclusions contained in the FEIS, the Jason Report, the Commonwealth Associates report and the evidence presented during the evidentiary hearing of March 6, 2003, Kentucky Pioneer requests that the Board enter an Order granting Kentucky Pioneer a Construction Certificate for the IGCC facility located in Clark County, Kentucky on the condition that Kentucky Pioneer meet all local planning and zoning requirements that existed on the date the application was filed prior to beginning any construction of the proposed facility.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Post-Hearing Brief was served this 19th day of September 2003, by United States mail, postage prepaid upon:

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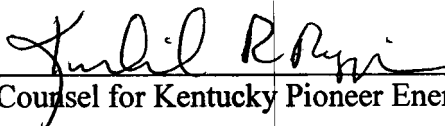
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