

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

In the Matter of:

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

ORDER

On October 12, 2004, the Kentucky State Board on Electric Generation and Transmission Siting ("Board") issued an order which conditionally approved the application of Estill County Energy Partners ("ECEP") to construct a 100-MW coal-fired electric generating plant in Estill County, Kentucky. The Board's October 12, 2004 Order specifically discusses an issue between ECEP and Intervenors, DLX, Inc. and Harry LaViers, Jr., as Trustee of a Trust created under the Will of Maxie LaViers, relating to whether ECEP has an interest in the property where the power plant is to be constructed. Because the property dispute was unresolved at the time of the issuance of the October 12, 2004 Order and based on a finding by the Board that ECEP has not shown that it had any rights to the property at issue,¹ the Board conditioned its approval of ECEP's application "on a filing by ECEP in which it can demonstrate a clear possessory right to the site on which Applicant intends to build and operate the plant. This filing is necessary to satisfy the Board's statutory requirement to consider '[t]he legal boundaries of the proposed site.'"²

¹ October 12, 2004 Order, at 9.

² October 12, 2004 Order, at 7-8.

The October 12, 2004 Order directed that the filing by ECEP should include, among other things, “deeds, a certified boundary survey, or other proof of ownership or right of possession”³ and that ECEP should demonstrate that it either “has property rights independent of Fox Trot Properties, or ... that Fox Trot Properties has property rights and ECEP has an option, lease, or some other contract with Fox Trot Properties giving [ECEP] property rights sufficient to construct and operate the proposed plant.”⁴ Pursuant to the October 12, 2004 Order, ECEP was also required to obtain and record in the Estill County Clerk’s Office a certified boundary survey for the real property upon which ECEP will construct the power plant and upon which on-site waste coal will be mined as a fuel source for the power plant. Lastly, the October 12, 2004 Order directed ECEP to file an annual status report throughout the duration of the construction period as part of the Board’s monitoring program to ensure that the proposed merchant plant is constructed consistent with the representations made in ECEP’s application. The annual reports were required to include, among other things, information concerning the progress of the construction and any obstacles encountered during the construction process.

According to the 2008 annual report submitted by ECEP on December 15, 2008, the United States Court of Appeals for the Sixth Circuit Court affirmed a lower court’s decision finding that DLX, Inc. was the owner of the disputed refuse pile tract. The 2008 annual report also indicated that Fox Trot Properties, LLC had money judgments against DLX, Inc. and judgment liens on the refuse pile tract, which Fox Trot Properties, LLC was proceeding to enforce in Estill Circuit Court. The 2008 annual report further

³ *Id.* at 26.

⁴ *Id.*

indicates that the judgment liens will allow Fox Trot Properties, LLC, and ultimately ECEP, to acquire the refuse pile tract at a court-ordered lien foreclosure sale.

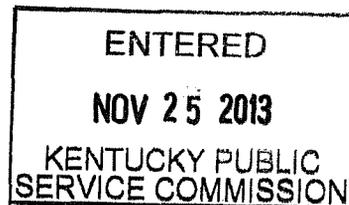
The Board notes that it has been over nine years since we issued the order conditionally approving ECEP's application for a certificate to construct the merchant electric generating plant. A condition of that approval was for ECEP to make a filing demonstrating a clear possessory right to the property that is the situs of the power plant to be constructed and operated by ECEP. To date, the Board has not received the requisite filing from ECEP establishing its possessory interest in the subject property. On the contrary, the information received by the Board thus far has indicated that ECEP does not have the necessary possessory interest in the subject property sufficient for it to construct the proposed electric generating plant. The Board also takes notice that since 2008, ECEP has failed to file an annual status report as required under the October 12, 2004 Order.

IT IS THEREFORE ORDERED that ECEP shall, within 20 days of the date of this Order, show cause why the conditional approval of construction should not be revoked and this case dismissed and removed from the Board's docket due to ECEP's failure to comply with the conditions imposed by the October 12, 2004 Order.

By The Kentucky State Board on
Electric Generation and Transmission
Siting

ATTEST:


Executive Director
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on behalf of The Kentucky State
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